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Stare Decisis and Constitutional Text

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STARE DECISIS AND CONSTITUTIONAL TEXT

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Almost everyone acknowledges that stare decisis should play a significant role when the Supreme Court of the United States resolves constitutional cases. Yet the academic and judicial rationales for this practice tend to rely on naked consequentialist considerations, and make only passing efforts to square the Court's stare decisis doctrines with the language of the Constitution. This Article offers a qualified defense of constitutional stare decisis that rests exclusively on constitutional text. It aims to broaden the overlapping consensus of interpretive theories that can support a role for constitutional stare decisis, but to do this it must narrow the circumstances in which stare decisis can be applied.

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INTRODUCTION

The doctrine of stare decisis allows the Supreme Court to uphold laws that violate the Constitution and invalidate laws that don't. It is not clear how that practice can be reconciled with the written Constitution, a document that the justices are bound by oath to uphold.

To be sure, many have offered pragmatic defenses of constitutional stare decisis. The themes are familiar: it promotes stability,[1] protects reliance interests,[2] constrains judicial discretion,[3] and reduces the decision costs of resolving constitutional cases.[4] But all of these rationales rest on a controversial premise: that good consequences suffice to justify a judicial practice or doctrine. The Supreme Court, however, derives its legitimacy from the authority of the written Constitution, and to maintain a plausible claim to obedience, the Court must ensure that its rulings comport with the document that confers its power to decide cases. Yet few even attempt to supply a textual justification for a doctrine that permits the Supreme Court to enforce an unconstitutional statute, or subordinate a constitutional one to its previously decided rulings. Even the most thoroughgoing textualists confess that they use stare decisis as a "pragmatic exception"[5] to their obligation to follow the enacted constitutional language, a concession to consequentialist considerations so strong that they trump even fidelity to the written document.[6]

This Article will advance a legalistic defense of constitutional stare decisis, a theory of precedent that rests on the written words of the Constitution rather than the consequentialist rationales that are all too often invoked as the exclusive justification for its use. At first blush, this project may sound like a contradiction in terms. It often seems that the very purpose of stare decisis is to produce outcomes that depart from faithful interpretation of the Constitution—all because an earlier court decision had misconstrued the

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1. *See* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 749–52 (1988).

2. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992).

3. *See* Thomas W. Merrill, *Originalism, Stare Decisis, and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271 (2005).

4. *See* RICHARD A. POSNER, HOW JUDGES THINK 145 (2008).

5. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 140 (Amy Gutmann ed., 1997).

6. *See infra* notes 43–47 and accompanying text.

(supposedly) supreme law of the land.[7] Yet this Article will demonstrate that the justices may—in limited situations—use wrongly decided constitutional precedents as rules of decision without betraying their allegiance to the enacted constitutional text. One can accommodate a limited role for stare decisis without surrendering wholesale to judicial pragmatism, or sacrificing textualist interpretive commitments to consequentialist override.

It is crucial to clarify at the outset the limits of this claim. First, this Article considers only a narrow slice of stare decisis: the cases in which the Supreme Court uses its own precedents as rules of decision in constitutional litigation. It makes no claims regarding an inferior court's obligation to follow the Supreme Court's decisions,[8] nor will it consider stare decisis in common law or statutory construction. Second, and more importantly, this Article takes no sides on whether the justices *should* invoke stare decisis in cases where the Constitution permits them to use it. There is a great distance between defending the constitutionality of a practice and defending its use; although this Article concludes that the Constitution allowed the justices to rely on stare decisis in controversial cases such as *Gonzales v. Raich*,[9] it will maintain strict neutrality on whether the justices' decisions in those cases were prudent or proper. It seeks only to acquit some of the Court's stare decisis practices of the charges of unconstitutionality that textualist commentators have leveled against them, and provide a theory of stare decisis that enables textualists and originalists, as well as pragmatists, to maintain a limited role for precedent in the resolution of constitutional cases. This Article aims to broaden the overlapping consensus of interpretive theories that can support a role for constitutional stare decisis, but to do this it must narrow the circumstances in which stare decisis can be applied.

This Article proceeds in four parts. Part I explains the difficulties in reconciling constitutional stare decisis with textualist interpretive theories. The problem, in short, is that stare decisis purports to allow erroneous Supreme Court precedents to replace the written Constitution as the rule of decision in constitutional litigation. This practice appears to contradict Article VI's Supremacy Clause, which designates "This Constitution"—not "Supreme Court doctrine"—as "the supreme Law of the Land."[10] It also contradicts the

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7. *See, e.g.*, SCALIA, *supra* note 5, at 139 ("The whole function of the doctrine [of stare decisis] is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability."); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1524 (2010) ("Stare decisis, in other words, privileges *tradition* over any particular substantive position.").

8. *Compare* Evan H. Caminker, *Why Must Inferior Courts Obey Supreme Court Precedents?*, 46 STAN. L. REV. 817 (1994) (arguing that the Constitution obligates inferior federal courts to follow the Supreme Court's pronouncements), *with* John Harrison, Essay, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 513 (2001) (claiming that rules of vertical stare decisis cannot be derived from the Constitution and have the status of federal common law).

9. 545 U.S. 1 (2005).

10. U.S. CONST. art. VI, cl. 2; *see* Akhil Reed Amar, *The Supreme Court, 2007 Term—Comment:* Heller, HLR, *and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 154 (2008) ("[T]he Constitution's text explicitly and unqualifiedly proclaims itself 'the supreme Law of

textualists' insistence that judges construe the Constitution in accordance with its original meaning rather than judge-created innovations. As a result, several textualist commentators have declared that their interpretive commitments forbid the justices to rely on precedents except when those precedents represent proper textual constructions of the Constitution.[11] This approach permits the justices to consult precedent for its epistemic value in finding the right textualist answer to questions of constitutional interpretation, but it precludes them from invoking stare decisis, which lets precedent supply the rule of decision in constitutional litigation without regard to its correctness. On this view, constitutional stare decisis necessarily rests on pragmatic interpretive methodologies, and is incompatible with any theory of judging that demands fidelity to the original meaning of constitutional text.

Part II refutes the notion that textualism requires a wholesale rejection of constitutional stare decisis. Even for those who accept the textualists' controversial interpretive premises—which equate "[t]his Constitution" with the meaning of the words in the context in which they were enacted, and regard this original meaning as distinct from and superior to the interpretive gloss of past Supreme Court rulings—the Supremacy Clause still allows for a significant, though limited, role for stare decisis in constitutional adjudication. For a textualist, the constitutionality of stare decisis depends first on whether the case presents a constitutional challenge to an act of Congress, as opposed to a state law, and second on whether the justices are using stare decisis as a sword (to nullify a law) or as a shield (to uphold it).

The indiscriminate textualist attacks on stare decisis go wrong by failing to acknowledge two issues that the Constitution's text and original meaning leave open. The first is whether, and to what extent, the Constitution obligates the justices to nullify unconstitutional federal statutes. Critics of stare decisis often assume that the Constitution *compels* the Supreme Court to disregard acts of Congress whenever they conflict with a constitutional provision, in the same way that Article VI explicitly requires judges to disregard state laws that contradict federal statutes, treaties, and constitutional provisions. When one proceeds from this major premise, it logically follows that the Supreme Court violates Article VI every time it invokes stare decisis to uphold an unconstitutional federal statute; these rulings sub-

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the Land'—supreme over any contrary statute, or executive order, *or judicial precedent*." (footnote omitted)); John Harrison, *Judicial Interpretive Finality and the Constitutional Text*, 23 CONST. COMMENT. 33, 35 (2006) (noting that Article VI "does not give judicial opinions the interpretive supremacy that it gives to substantive federal law").

11. *See, e.g.*, Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994) [hereinafter Lawson, *The Constitutional Case*]; Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007) [hereinafter Lawson, *Mostly Unconstitutional*]; Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257 (2005); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005); *see also* William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis:* Casey, Dickerson, *and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53.

ordinate a "supreme" law (the Constitution) to a "nonsupreme" rule of decision (judicial precedent). But the major premise of this argument is wrong on textual grounds; the written Constitution does not require the Supreme Court to invalidate every federal statute that contravenes the Constitution. Instead, the document gives the justices latitude in deciding whether and when to invoke their implied power to review the constitutionality of congressional acts.

To begin, Article VI designates federal statutes as "supreme" law, so long as they are enacted "in Pursuance" of the Constitution.[12] This "in Pursuance" caveat is most plausibly read to confer supremacy on all statutes that survive the bicameralism-and-presentment hurdles established in Article I, Section 7.[13] When the "supreme" Constitution conflicts with a "supreme" federal statute, a textualist justice must adopt a tiebreaking strategy, and there is nothing wrong with invoking an accepted practice such as stare decisis to break this deadlock in favor of congressional legislation. Even for those who believe that "in Pursuance thereof" requires federal statutes to comport with the Constitution's substantive constraints on federal power, it *still* does not follow that the Supreme Court's interpretations of the Constitution must always trump contrary interpretations adopted by the national political branches. Instead, the Supreme Court may allocate final interpretive authority over the Constitution in a manner that respects its institutional rivals as coordinate branches of the federal government—just as the executive branch does when it decides to enforce federal statutes and court judgments that the president considers repugnant to the Constitution. When the justices invoke stare decisis to uphold federal statutes against constitutional challenge, this is tantamount to a decision that allocates final interpretive authority over a constitutional question to the national political branches rather than the courts. Of course, *Marbury v. Madison* asserts that federal statutes are "supreme" only when they comport with the Supreme

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12. U.S. CONST. art. VI, cl. 2.

13. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 9 (1962) ("[T]he proviso that only those federal statutes are to be supreme which are made in pursuance of the Constitution means that the statutes must carry the outer indicia of validity lent them by enactment in accordance with the constitutional forms."); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888, at 71–73 (1985) (noting that the text of the Supremacy Clause "strongly suggests that the reference to laws made in pursuance of '*this* Constitution' was meant to distinguish those made under the Articles of Confederation"); Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1119 (2001) ("'In Pursuance thereof' means 'after,' not 'consistent with.'"); William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 20–21 (observing that "[t]he phrase 'in pursuance thereof' might . . . easily mean '*in the manner prescribed by this Constitution*,'" and concluding that "the only constitutional issue to be raised in a judicial forum to determine whether an act of Congress should be given effect is whether the bill has been enacted according to the forms prescribed in the Constitution"); *id.* at 21 ("It is . . . significant that the clause does *not* provide as follows: 'This Constitution, and the Laws of the United States *authorized and not limited thereby* . . . shall be the supreme Law of the Land.'" (alteration in original)).

Court's exposition of Congress's substantive powers,[14] and many take that decision to establish that the justices are duty-bound to disregard acts of Congress that they deem repugnant to the Constitution. But the written Constitution does not compel that approach, and one cannot attack the constitutionality of stare decisis by assuming the correctness of a Supreme Court precedent—even a canonical one like *Marbury*. In all events, the Supreme Court has established many exceptions to the *Marbury* principle, such as nonjusticiability doctrines, the political-questions doctrine, the presumption of constitutionality, and rulings that rely on the "political safeguards of federalism." Stare decisis is merely another example of the justices respecting federal statutes as the final resolution of a constitutional question, and these rulings do not violate the written Constitution, nor do they violate textualist interpretive principles—even if they create tension with the (nonsupreme) *Marbury* opinion.

The analysis changes when stare decisis leads the justices to *invalidate* an act of Congress. When a federal statute both survives the bicameralism-and-presentment process and complies with the Constitution's substantive provisions, it becomes "the supreme Law of the Land," and the Supremacy Clause precludes the justices from voting to invalidate that statute solely on the ground that it conflicts with an earlier-decided Supreme Court precedent. Using stare decisis in *these* situations would elevate a nonsupreme rule of decision (judicial precedent) over the supreme law of the land (a constitutional federal statute), violating the hierarchy established in Article VI's Supremacy Clause. So the textualists' Supremacy Clause objections to stare decisis are partly right. The Supremacy Clause does not preclude textualist Supreme Court justices from ever applying stare decisis; rather, it permits an asymmetrical regime that constrains their ability to use precedent when invalidating an act of Congress, but leaves them free to invoke stare decisis considerations in cases that uphold federal statutes against constitutional challenge.

The textualists' wholesale attacks on stare decisis overlook another ambiguity in the written Constitution: the extent to which it obligates federal courts to apply state law as rules of decision. Many assume that the Constitution requires federal courts to enforce state law whenever it complies with the Constitution, federal statutes, and treaties. But nothing in the Supremacy Clause secures this status for state law. It merely establishes a two-tiered hierarchy among the sources of law that courts might apply: the Constitution, federal statutes, and treaties are "supreme"; all other potential rules of decision, such as state law, customary international law, and judicial precedents, are nonsupreme. Article VI does not establish any rank among these nonsupreme rules of decision. Nor does it preserve *any* status for state law; it requires only that state law yield to the three categories of "supreme" laws. The Supremacy Clause simply does not resolve whether the Supreme Court should apply state law or judicial precedent in cases where they conflict. Even when a precedent misconstrues the Constitution, it can still

14. 5 U.S. (1 Cranch) 137 (1803).

supply a nonsupreme, nonstate-law rule of decision—a status akin to the "general common law" that existed prior to *Erie Railroad Co. v. Tompkins*,[15] or the court-created admiralty and interstate law that the Supreme Court has applied throughout its history.[16] Although *Erie* purported to squelch any possibility of federal courts applying rules of decision other than "supreme" federal laws and state law, at least one important category of general common law has survived the *Erie* revolution: the dubious or mistaken constitutional pronouncements that the Supreme Court continues to use as rules of decision in cases where litigants bring constitutional challenges to state laws. And nothing in the text of the Supremacy Clause precludes the Supreme Court from using its constitutional precedents as nonsupreme rules of decision in this manner.

The Supremacy Clause does, however, restrict the justices' ability to invoke stare decisis in rulings that reject federal constitutional challenges to state laws. State laws, unlike federal statutes, are nonsupreme rules of decision, and judicial precedent can never excuse a Supreme Court decision that elevates an unconstitutional state law over a federal constitutional command. Although the text of the Constitution leaves room for courts to enforce an unconstitutional *federal* statute or treaty, the Supremacy Clause *compels* state law to yield to the "supreme Law of the Land" and specifically enlists the "Judges in every State" to enforce this hierarchy. So for constitutional challenges to state laws, the Supremacy Clause again permits an asymmetrical stare decisis regime, but with state law the imbalance runs in the opposite direction: textualist justices may invoke stare decisis when they subordinate (nonsupreme) state laws to (nonsupreme) judicial precedent, but they cannot reject a federal constitutional challenge to state law simply by incanting one of their erroneous, earlier-decided pronouncements.

This entire theory of stare decisis rests on a straightforward principle of protestant constitutional interpretation: the Supreme Court is legally bound to comply with the ratified text of the Constitution, but it is under no obligation to obey the self-imposed constraints of its earlier pronouncements.[17]

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15. 304 U.S. 64 (1938).

16. Charles Alan Wright and Mary Kay Kane note the Supreme Court's application of this court-created common law over state law:

> It is not accurate to say, however, that the law of the state is to be applied in all cases except on matters governed by the Constitution or Act of Congress. Neither the Constitution nor any statute provides the answer to controversies between states about interstate streams, or similar interstate conflicts, nor do these sources indicate where the governing law is to be found. Yet the Court, of necessity, has developed its own body of law to govern these questions, because of the obvious unsuitability of looking to the law of a particular state when two states are in dispute.

CHARLES ALAN WRIGHT & MARY KAY KANE, THE LAW OF FEDERAL COURTS 413–14 (6th ed. 2002).

17. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 27–30 (1988) (distinguishing "protestant" and "catholic" strains in constitutional interpretation, where the former regards constitutional text as the sole source of legal authority, while the latter confers an equally authoritative status on unwritten traditions and the Supreme Court's past interpretive gloss).

There is no cause for constitutional angst when the Supreme Court uses stare decisis in a manner that produces inconsistencies with the needlessly broad language in its *Marbury* and *Erie* opinions. Instead, constitutional problems arise only when stare decisis causes the justices to invert or ignore the hierarchy of laws established in Article VI, a disposition that disregards the external legal commands imposed by those who enacted and ratified the constitutional text. Those situations, however, are considerably more narrow than the textualist critics of stare decisis suppose.

Part III explores how textualist jurists might implement this theory of stare decisis in their decisionmaking strategies, when they may encounter uncertainty in deciding whether a precedent correctly interpreted the Constitution. And Part IV considers the implications of this theory for the Supreme Court's case law.

I. STARE DECISIS AND THEORIES OF CONSTITUTIONAL INTERPRETATION

A. *Pragmatism and Textualism*

Stare decisis isn't a particularly troubling practice for pragmatists or realists. They generally take judicial review for granted, viewing the Supreme Court as a political institution with a largely discretionary veto power over federal and state laws.[18] Pragmatists of course recognize that political and institutional realities constrain the Court's judicial-review practices. The president and Senate, for example, use their appointment prerogatives to bring the Court into line with their visions of the proper judicial role, and the prospects of impeachment, constitutional amendment, jurisdiction-stripping legislation, and political-branch defiance all keep the Court's rulings within a range acceptable to the national political institutions.[19] Pragmatists also believe that courts should respect constitutional text. But many pragmatists acknowledge constitutional language only because it serves as a focal point, a convenient device that enables a diverse society to agree on what constitutes fundamental law.[20] The most sweeping forms of pragmatic constitutional interpretation empower the justices to choose among the linguistically permissible interpretations of constitutional provisions, or even atextual interpretations, so long as they do not unravel the

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18. *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 12, 26 (2002) (noting that Supreme Court justices have "virtually untrammeled policymaking authority" and characterizing the perception of judges as "objective, dispassionate, and impartial" as "The Mythology of Judging"); Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 40 (2005) ("[T]he Supreme Court, when it is deciding constitutional cases, is political in the sense of having and exercising discretionary power as capacious as a legislature's.").

19. *See* POSNER, *supra* note 4, at 125–57; *see also* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957) ("[T]he policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.").

20. *See, e.g.*, DAVID A. STRAUSS, THE LIVING CONSTITUTION 99–114 (Geoffrey R. Stone ed., 2010).

document's ability to serve this useful coordinating function. For pragmatists, the Supreme Court's chief end is to generate positive consequentialist outcomes within these realpolitik constraints.[21] And there is no shortage of plausible consequentialist rationales for the Court's constitutional stare decisis practices.[22]

But stare decisis doctrines present more serious challenges for textualist jurists. A textualist's primary concern is the legitimacy of judicial pronouncements—how a court can justify commanding obedience to its decisions, even from those who disagree with them. Textualists are not indifferent to consequentialist considerations, but they deny that consequentialist analysis alone can justify a court decision because people will inevitably disagree over what counts as a normatively desirable outcome (that's why the litigants are in court) and there are no reasons to think that life-tenured judges have any comparative advantage in deciding what consequences are "good."[23] What's more, a society governed by law requires a theory that distinguishes legitimate from illegitimate uses of force. De facto power does not supply a justification for government action, even when combined with a sincere belief that good consequences will ensue. Something more is needed to differentiate the coercive powers of a federal court from those of a schoolyard bully.

Textualism holds that the written Constitution—rather than custom or public acquiescence—enables the Supreme Court to legitimately invoke the coercive powers of the state, and insists that the enacted constitutional language both establishes and constrains the legitimate scope of the Supreme Court's authority. Courts cannot bite the hand that feeds them. Of course, all jurists, including pragmatists, claim to respect the Constitution's text. But textualists reject the loose interpretive methodologies that allow judges to adopt anachronistic or linguistically conceivable constructions of constitutional language. Instead, they insist that the Supreme Court construe the Constitution's text in the context in which it was enacted. There are variants and nuances among these textualist theories of interpretation: some focus on original public meaning,[24] others target the framers' or ratifiers'

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21. *See generally* CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE (2009). Pragmatic jurists may, of course, subordinate case-specific consequences to systemic and rule-consequentialist concerns. *See, e.g.*, POSNER, *supra* note 4, at 238–39 ("[S]ensible legal pragmatism tells the judge to consider systemic, including institutional, consequences as well as consequences of the decision in the case at hand. . . . Sensible pragmatic judges are to be distinguished from shortsighted pragmatists, blinded by the equities of the case to the long-term consequences of their decision[.]").

22. *See supra* notes 1–4 and accompanying text.

23. *See, e.g.*, ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 153–82 (2006) (noting that judges suffer from limited information and bounded rationality, which distort their efforts to assess the consequences of their decisions); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989) (arguing that the legislature is a "more appropriate expositor of social values" than the judiciary).

24. *See* Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 29 (2000) ("What counts as text is the document as

understandings,[25] and still others try to uncover what a word or phrase fairly meant at the time of enactment.[26] But all of these approaches recognize that the Supreme Court derives its powers from a higher source of authority, and that the formal ratification of constitutional text serves as the mechanism by which power is delegated to government institutions. It follows from this view that judges must enforce the meaning of the enacted language rather than the interpretations that modern-day judges find normatively desirable.[27] Of course, the justices may occasionally get away with rulings that depart from textualist interpretive methodologies; the political branches lack the wherewithal to counteract every atextual or ahistorical constitutional pronouncement, and the public may acquiesce. But textualism deems these decisions wrong—regardless of the positive consequences that they may generate over the short term or the long run.[28]

Some commentators view textualism as nothing more than disguised consequentialism. They regard talk of "legitimacy" as a rhetorical device designed to induce courts to produce outcomes that textualists find agreeable, and they call on textualists to defend these outcomes on consequentialist grounds.[29] But the textualist project is not intended to pro-

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understood by the American People who ratified and amended it, and what counts as history is accessible public meaning, not secret private intent.").

25. *See generally* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (2d ed. 1997).

26. *See* SCALIA, *supra* note 5, at 38.

27. Critics of textualism like to trumpet the Constitution's substantive imperfections, such as its initial toleration of slavery, and question its popular pedigree by noting that most of its provisions were approved hundreds of years ago by people who are long dead and through a process that excluded women and most blacks. *See, e.g.*, David A. Strauss, Essay, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1733–35 (2003). But textualists do not think that these defects—though serious and troubling—can liberate the justices from their obligation to follow the meaning of the ratified text without simultaneously undercutting the document's ability to vest the Supreme Court with *any* form of legitimate power. No one believes that the Constitution's substance or popular pedigree is perfect, but textualists reject the notion that these imperfections allow one to retain the court-empowering provisions in the ratified Constitution without respecting its court-constraining provisions.

28. I use the term "textualism" rather than "originalism" to describe this approach to constitutional interpretation for two reasons. First, "originalism" can encompass theories that interpret constitutional provisions according to the intentions or specific expectations of the drafters; textualism, by contrast, rejects this type of narrow intentionalism. *See* Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1120 n.4 (1998). Second, textualism is wary of constitutional doctrines, such as the Dormant Commerce Clause, that cannot plausibly be derived from the Constitution's language, even if one could marshal historical evidence demonstrating that the drafters, ratifiers, and general public expected courts to enforce them. *See Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000) (Easterbrook, J.). For textualists, the written words of the Constitution have primacy; original understandings that exist in the air do not control.

29. *See, e.g.*, Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 644 (1999) (characterizing defenses of interpretive formalism as "pragmatic arguments in disguise"). Some have tried to answer this challenge by offering rule-consequentialist defenses of formalistic interpretive methodologies. *See* VERMEULE, *supra* note 23, at 33 (defending interpretive formalism "because that decision-procedure will pro-

vide a roadmap to utility maximization; it seeks to provide a theory that can distinguish law from judicial fiat. It judges the correctness of judicial decisionmaking by the criteria of text and history, rather than the more subjective and indeterminate criteria of act- or rule-consequentialism.[30] Pragmatism and textualism represent distinct approaches to constitutional law, and for stare decisis to attain unassailable acceptance in the legal profession, it must rest on rationales that can satisfy not only the pragmatists, but also the subset of jurists and lawyers who embrace or lean toward textualist interpretive methodologies. This Article does not take sides among these approaches to constitutional interpretation, but seeks to establish an overlapping consensus for stare decisis by providing a theory that enables textualists to maintain a significant role for precedent in constitutional litigation.[31]

B. *Textualism and Stare Decisis*

Stare decisis allows the Supreme Court to uphold or invalidate a statute based solely on its compliance (or noncompliance) with a prior Supreme Court decision. The justices need not examine whether their precedent correctly interprets the Constitution; indeed, the very purpose of stare decisis is to avoid the decision costs (and other costs) that would arise if the Court were continually to reconsider previously decided constitutional questions. Weaker theories of precedent allow the justices to consult prior decisions for their epistemic value in helping them find the right answer to difficult constitutional questions. But stare decisis is a stronger doctrine that deems judicial precedents authoritative, enabling them to serve as the sine qua non of a Supreme Court disposition.[32]

Stare decisis presents problems for textualist jurists because it allows the Supreme Court to apply its precedents as rules of decision even when they deviate from proper textualist interpretations of the Constitution. This practice seems to run headlong into Article VI of the Constitution, which designates only three categories of laws as "the supreme Law of the Land": "[t]his Constitution," the "[l]aws of the United States which shall be made in Pursuance thereof," and "[t]reaties made ... under the Authority of the United States."[33] Missing from this list are Supreme Court pronouncements,

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duce the best ground-level consequences for legal institutions, rather than because some higher source of law or higher-level principle mandates it"); John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 384 (2007) (arguing that adherence to the original meaning of provisions that surmounted the supermajoritarian requirements of Articles V and VII is "likely to have good consequences").

30. *See* POSNER, *supra* note 4, at 240–41 (admitting that "what counts as an acceptably pragmatic resolution of a dispute is relative to the prevailing norms of particular societies" and that legal pragmatism does not even "specify which consequences should be considered").

31. *See generally* JOHN RAWLS, POLITICAL LIBERALISM (expanded ed., 2005).

32. *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 576 (1987) ("[A] pure argument from precedent ... depends only on the *results* of those decisions, and not on the validity of the reasons supporting those results.").

33. U.S. CONST. art VI, cl. 2.

so stare decisis appears to turn Article VI on its head when it allows a non-supreme rule of decision (court precedent) to trump the Constitution (as textualists would interpret it).[34] This objection to stare decisis assumes that "[t]his Constitution" should be interpreted in accordance with textualist interpretive methodologies, but it has already been established that legal pragmatism can accommodate stare decisis. The question to consider is whether, and to what extent, stare decisis can also coexist with textualist interpretive premises.

Textualist responses to this problem fall primarily into two camps. On one side are those who deem stare decisis unconstitutional whenever it allows precedent to trump the proper textualist interpretation of a constitutional provision. Professor Lawson, for example, argues that the Supremacy Clause permits the justices to rely on constitutional precedent only for its epistemic value in finding the right answer to constitutional questions, and never as an authoritative rule of decision in its own right.[35] Other commentators reach similar conclusions.[36] But even assuming that this is a proper construction of the Supremacy Clause—Part II will reject much of Professor Lawson's textual exegesis of Article VI—many textualists are understandably reluctant to embrace this approach. First, political realities make it impossible to nominate or confirm any jurist who denies any authoritative role for constitutional precedent. Too many constituencies, on both ends of the political spectrum, are intent on preserving at least a subset of the Supreme Court's atextual, ahistorical, or poorly reasoned constitutional pronouncements.[37] This is not to say that politics should control constitutional interpretation, but it is a major strike against any theory of judging—no matter how compelling it may seem to some—if its adherents will be confined to the academy for life and unable to implement their theory in the real world. Second, even if it were possible to appoint judges who hold this view, this is simply not a responsible position. Many have

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34. *See, e.g.*, Lawson, *Mostly Unconstitutional*, *supra* note 11, at 6.

35. *See id.* at 20 (arguing that the Constitution prohibits the Supreme Court from relying on precedent except in cases where prior court decisions supply "good evidence of the right answer").

36. *See* Barnett, *supra* note 11, at 269 ("Where a determinate original meaning can be ascertained and is inconsistent with previous judicial decisions, these precedents should be reversed and the original meaning adopted in their place."); Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling* Planned Parenthood of Southeastern Pennsylvania v. Casey, 22 CONST. COMMENT. 311, 312–13 (2005) ("[T]he Supreme Court ought to follow the text of the Constitution, as originally understood, rather than its own precedents, where there is clear conflict between the two."); Paulsen, *supra* note 11, at 291 ("*Stare decisis* is *unconstitutional*, precisely to the extent that it yields deviations from the correct interpretation of the Constitution! It would have judges apply, in preference to the Constitution, that which is not consistent with the Constitution."); *see also* Consovoy, *supra* note 11, at 104, 106 ("The Court should abandon stare decisis in constitutional cases. . . . Pragmatism has no place in the Supreme Court and its application in the realm of stare decisis is unwarranted and unacceptable.").

37. *See* Monaghan, *supra* note 1, at 727 ("[M]uch of the existing constitutional order is at variance with what we know of the original understanding.").

noted that the constitutionality of paper money would be called into question if the justices were forbidden to invoke stare decisis.[38] Also, the original understanding of the Commerce Clause is closer to Professor Epstein's[39] and Justice Thomas's views[40] than the near-plenary power that Congress enjoys under the Court's post-1937 jurisprudence.[41] And *Brown v. Board of Education*'s interpretation of the Equal Protection Clause is almost impossible to square with original-meaning textualism.[42] But a Court opinion that even ponders the possibility of overturning the paper-money cases would throw the economy into chaos; a ruling reversing the New Deal would undermine decades of public and private decisions made in reliance on that edifice; and a decision overruling *Brown* would damage the Court's moral standing with the public. Textualism may reject consequentialist considerations as the touchstone of judicial decisionmaking, but if textualism compels *these* types of outcomes, then textualism will never be a viable interpretive theory.

On the other side are textualists who treat stare decisis as a consequentialist override to their interpretive commitments. Judge Easterbrook, for example, argues that courts should preserve atextual doctrines like *Miranda* and "substantive due process" because they represent "structural decision[s] on which other doctrines and institutions depend," and overruling them would undermine "stability in the structure of government."[43] In his view, constitutional stare decisis "depends on moral and prudential judgments more than strictly legal ones."[44] Justice Scalia,[45] Judge

38. *See, e.g.*, Kenneth W. Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367, 389 ("[A]lthough it may have been inconvenient to the proponents and constitutional defenders of legal tender paper money, it is difficult to escape the conclusion that the Framers intended to prohibit its use.").

39. *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

40. United States v. Lopez, 514 U.S. 549, 584–602 (Thomas, J., concurring).

41. *See, e.g.*, Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

42. *See* David A. Strauss, *Originalism, Precedent, and Candor*, 22 CONST. COMMENT. 299, 305 (2005) (noting that the *Brown* Court "essentially conceded that the original understanding of the Fourteenth Amendment did not support the conclusion it reached in *Brown*" and that "the best lawyers and best historians of the time could not identify an originalist argument for *Brown* that was plausible enough to be used even by a Court with every incentive to use such an argument").

43. Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 430–33 (1988).

44. *Id.* at 432.

45. *See* SCALIA, *supra* note 5, at 139 ("The whole function of [stare decisis] is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability. It is a compromise of all philosophies of interpretation . . . ."); Scalia, *supra* note 23, at 861–62 (conceding that "almost every originalist would adulterate originalism with the doctrine of *stare decisis*," because "most originalists are fainthearted").

Bork,[46] and Professor Amar[47] adopt similar rationales; each of them embraces constitutional stare decisis as an exception to their normal textualist interpretive methodologies, and justify this carve-out by invoking consequentialist considerations such as maintaining stability and protecting reliance interests.

But these textualists' efforts to accommodate stare decisis also run into serious objections. First, allowing judges to invoke stare decisis as a "pragmatic exception" to textualism invites all sorts of ideological considerations to influence judicial decisionmaking, and undermines the constraints on judicial discretion that textualist interpretive methodologies are supposed to provide. One need only look at the current Supreme Court, where everyone seems to be a fair-weather friend when it comes to stare decisis. The Court's liberal justices will not hesitate to overturn decisions like *Bowers v. Hardwick*[48] or *National League of Cities v. Usery*,[49] yet they solemnly invoke stare decisis when the topic switches to abortion rights[50] or the scope of federal power.[51] Many of the Court's conservative jurists cheerfully overrule adverse precedents on affirmative action[52] or campaign-finance reform,[53] while they build their state sovereign immunity jurisprudence on the edifice of *Hans v. Louisiana*[54]—a contested interpretation of the Eleventh Amendment that the Court propounded more than 100 years ago. And the Court's criteria for deciding whether to overrule a constitutional precedent—such as the need to protect "reliance interests" created by erroneous court rulings—are highly subjective. Every Supreme Court ruling establishes reliance interests; the decision to retain a Court precedent depends on the perceived strength of those reliance interests and whether they are worth protecting, and those questions involve value judgments more than legal analysis.[55] It is

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46. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 158 (1990). Bork argues that the justices should adhere to previous rulings, even if "clearly incorrect," when they "have become so embedded in the life of the nation, so accepted by the society, so fundamental to the private and public expectations of individuals and institutions, that the result should not be changed now. This is a judgment addressed to the prudence of a court." *Id.*

47. *See* Amar, *supra* note 24, at 28 ("[P]ure textualism can risk serious instability if not chastened by attention to the legal status quo. Thus, even the best documentarian reading must sometimes yield in court to brute facts born of earlier judicial and political deviations.").

48. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

49. 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

50. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992).

51. *See* Gonzales v. Raich, 545 U.S. 1, 17–22 (2005).

52. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995), *overruling* Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990).

53. *See* Citizens United v. FEC, 130 S. Ct. 876 (2010), *overruling* Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990).

54. 134 U.S. 1 (1890).

55. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV, generated strong reliance interests for slaveholders, but

hard to refute the cynical observers who regard constitutional stare decisis as little more than a rhetorical trope to disguise decisions that rest primarily on the justices' ideological preferences.[56] And it is even harder for textualism to maintain its pretense of constraining judicial power when it accommodates these discretionary stare decisis considerations.[57]

Second, the idea of subjecting the words of the written Constitution to consequentialist override contradicts the very premise of textualism, which denies that judges can substitute their consequentialist assessments for legal commands. Textualists insist that the ratification of constitutional language establishes the Supreme Court's authority, and the meaning of those enacted words simultaneously defines the limits of the Court's legitimate powers. Allowing the justices to attain a prescriptive easement over the Constitution's original meaning is impossible to reconcile with this philosophy of judging, especially when no provision in the Constitution purports to confer a "stare decisis" dispensing power on the Supreme Court. Worse, this concession to precedent makes it hard for textualists to denounce other justices' excursions into living constitutionalism as unlawful or illegitimate. Once a jurist acknowledges that the Supreme Court may subordinate constitutional text or history to policy considerations, he has no standing to complain when other justices use their powers to promote consequentialist outcomes that they deem normatively desirable, such as abolishing the death penalty,[58] forcing states to comply with the exclusionary rule,[59] or advancing abortion rights[60] and homosexual rights.[61] A partial surrender to judicial pragmatism becomes a total surrender; once one concedes that consequences can trump the original meaning of constitutional text, pragmatic considerations will ultimately determine when one should prevail over the other.

So textualists seem stuck in a dilemma when it comes to stare decisis. They can either selectively abandon their textualist interpretive methodologies or else follow their interpretive commitments to their logical conclusions. The former path leads to accusations of hypocrisy, the latter to

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no one thinks (and no one should think) that those reliance interests ought to compel the post–*Dred Scott* Supreme Court to extend stare decisis to that ruling.

56. *See, e.g.*, SEGAL & SPAETH, *supra* note 18, at 81 ("[P]recedent . . . provides virtually no guide to the justices' decisions. All that one can say is that precedent is a matter of good form, rather than a limit on the operation of judicial policy preferences."); *see also id.* at 288–311 (presenting empirical data to support this view of precedent).

57. In the words of Chief Justice Roberts, stare decisis requires the Court to "balance the importance of having constitutional questions *decided* against the importance of having them *decided right*." *See Citizens United*, 130 S. Ct. at 920 (Roberts, C.J., concurring). This balancing test provides no guidance to justices who must weigh these competing concerns.

58. *See* Furman v. Georgia, 408 U.S. 238, 257–306 (1972) (Brennan, J., concurring).

59. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

60. *See* Roe v. Wade, 410 U.S. 113 (1973).

61. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

ridicule—or so the critics say.[62] Either way, constitutional stare decisis seems incompatible with textualist theories of constitutional interpretation.

II. RECONCILING STARE DECISIS WITH CONSTITUTIONAL TEXT

Textualists can escape this dilemma only by embracing a theory of stare decisis that is both rooted in textualist interpretive methodologies and that cabins judicial discretion more than the hollow balancing tests that the current Supreme Court employs. Section II.A considers three of the leading theories that have attempted to reconcile stare decisis with constitutional text. Although each has some surface plausibility, none of them supplies a satisfying account of stare decisis for textualists who equate "[t]his Constitution" with the original meaning of its words. Worse, none of these existing textual theories provides much guidance on when a justice should adhere to or disregard a wrongly decided precedent. Section II.B places stare decisis on a more secure textual footing by demonstrating that the Supremacy Clause—in limited situations—permits textualist justices to use wrongly decided precedents as rules of decision in constitutional litigation.

A. *Previous Efforts to Reconcile Stare Decisis with Constitutional Text*

1. Equating Supreme Court Precedent with the "Supreme Law of the Land"

One possible way to counter the Supremacy Clause objections to stare decisis is by elevating the Supreme Court's constitutional precedents into the "supreme [l]aw" described in Article VI, either by equating them with the Constitution itself,[63] or by treating past Supreme Court pronouncements as authoritative constructions of the document.[64] The former approach is

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62. *See, e.g.*, STRAUSS, *supra* note 20, at 17 (arguing that rigorous originalism produces results that are "inconsistent with principles that are at the core of American constitutional law," and that "fainthearted" originalism that accommodates stare decisis removes constraints on judicial discretion and allows judges to become "sometime-living-constitutionalists"); CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 53–78 (2005) (arguing that original-meaning textualism is "radical" and "indefensible" unless tempered by stare decisis, and that "faint-hearted" textualists who accommodate stare decisis "cannot easily show that their approach promotes their goal of binding judges through clear rules"); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 156–57 (1999) (criticizing "conservative originalists" for opportunistically invoking stare decisis to preserve nonoriginalist rulings such as *Brown v. Board of Education*, while refusing to accede to other nonoriginalist rulings, such as *Roe v. Wade*).

63. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958) (equating the majority opinions that accompany the Supreme Court's resolution of constitutional cases with the "supreme Law of the Land" described in Article VI); CHARLES EVANS HUGHES, ADDRESSES OF CHARLES EVANS HUGHES, 1906–1916, 185 (2d ed. 1916) ("We are under a Constitution, but the Constitution is what the judges say it is . . . .").

64. *See, e.g.*, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1361 (1997) (arguing that nonjudicial officials should respect the Supreme Court's constitutional pronouncements as a binding interpretive gloss on

demonstrably implausible; an institution's past interpretations of the Constitution do not become part of the Constitution, even in a world where other government actors regard the Supreme Court as the authoritative expositor of constitutional meaning. What's more, drawing a distinction between "[t]his Constitution" and past judicial interpretations is logically necessary to preserve the Court's power to overrule its past constitutional pronouncements.[65] Supreme Court pronouncements can help disambiguate and settle disputed constitutional issues, but one cannot treat this interpretive gloss as part of the Constitution itself.[66]

Yet none of this forecloses the justices from treating their earlier constitutional precedents as authoritative constructions of the document. Textualists may insist that Article VI's reference to "[t]his Constitution" refers only to the original meaning of its text, but this does not supply any answer to the question of interpretive finality: Which institutions or processes conclusively resolve disputes over the Constitution's meaning?

Even textualists recognize that few, if any, government actors possess wholesale interpretive autonomy over the Constitution. Inferior federal courts follow the Supreme Court's constitutional pronouncements. Presidents enforce federal-court judgments in constitutional cases, even if they would have decided the constitutional issues differently.[67] And the Supreme Court, when it invokes the "political-questions doctrine," allows the political branches to have the final say on disputed issues of constitutional interpretation. Because the Constitution is largely silent on questions of interpretive finality, one must consider whether it leaves room for textualist justices to designate their predecessors' interpretations as authoritative expositions of constitutional meaning. If so, then Article VI would liberate even textualist justices to apply "[t]his Constitution"—as interpreted by past Supreme Courts—as the "supreme" rule of decision, treating the Court's precedents as conclusive gloss on the document.[68]

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the document, even in the case of "judicial interpretations [of constitutional provisions] they believe wrong").

65. *See* David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 135 (1993) ("Of course there is a difference between constitutional law and the Constitution, and there are times when the former should be changed to make it more consistent with the latter."). One might analogize the relationship between the Constitution and Supreme Court precedent to the relationship between statutes and agency regulations. Agency regulations are regarded as binding interpretations of statutes, but they are not themselves statutes. An agency can unilaterally revoke its regulations, but it can never amend a statute outside of Article I, Section 7's bicameralism-and-presentment procedures.

66. *See* Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) ("[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we [justices] have said about it.").

67. *See* William Baude, *The Judgment Power*, 96 GEO. L.J. 1807 (2008).

68. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.").

But it is hard for a textualist to accept this construction of Article VI. The Constitution's failure to specify clear rules of interpretive finality does not empower the justices to assign interpretive authority over the Constitution to whomever suits their druthers. The Supreme Court could not treat the UN secretary-general's interpretations of constitutional provisions as authoritative rules of decision, nor could it confer this status on a law professor's academic writings, no matter how reliable those interpreters might be. Rather, a textualist justice must show how provisions in the written Constitution authorize him to respect the finality of some other institution's constitutional pronouncements, even when those interpretations flout the original meaning of constitutional text.[69] A textualist district-court judge, for example, might accept the justices' nontextualist opinions as the authoritative exposition of constitutional meaning because Article III designates their court "supreme" and his court "inferior."[70] The Supreme Court can make a similar type of showing in cases involving a "textually demonstrable constitutional commitment of the issue to a coordinate political department."[71] And when a question of constitutional interpretation lacks "judicially discoverable and manageable standards for resolving it," this can imply that the Supreme Court should accept the resolutions reached by the national political branches rather than attempt to establish an ad hoc and unprincipled constitutional jurisprudence.[72]

But does the Constitution authorize a textualist justice to treat his *predecessors'* nontextualist opinions as final and authoritative expositions of constitutional meaning? It is more difficult to square this allocation of interpretive authority with a textualist interpretation of the document. First, no language in the Constitution indicates that the Supreme Court should obey an earlier Court's erroneous constitutional precedents.[73] And although a plausible textual case can be made for allowing the Supreme Court to respect federal statutes as final and conclusive interpretations of the

69. *See, e.g.*, John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333, 358 (1998) (arguing that judges start with interpretive authority over the Constitution unless and until they "encounter a finality rule" instructing them to accept someone else's interpretation).

70. *See* Amar, *supra* note 24, at 80; Caminker, *supra* note 8.

71. Baker v. Carr, 369 U.S. 186, 217 (1962). For example, when the Constitution gives the Senate "the *sole* [p]ower to try all [i]mpeachments," U.S. CONST. art I, § 3, cl. 6 (emphasis added), this language indicates that the Senate, rather than the Supreme Court, will have the final say on the trial procedures that it will use. *See* Nixon v. United States, 506 U.S. 224, 238 (1993).

72. *See* Vieth v. Jubelirer, 541 U.S. 267, 277–78 (2004) (plurality opinion) ("Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.").

73. *See, e.g.*, Harrison, *supra* note 8, at 513 (demonstrating the impossibility of deriving the federal courts' stare decisis doctrines from constitutional text).

Constitution,[74] there are no textual provisions that imply a similar status for the views expressed in the Court's previously announced opinions.[75]

Second, even if the Constitution's silence on issues of interpretive finality might allow the justices to respect constitutional pronouncements from different institutions of the federal government, it still does not follow that the justices may bestow "finality" status on the erroneous rulings of their predecessors. It is one thing for the Court to accord finality to interpretations rendered by one or more of its rival, coordinate federal branches. It is quite another matter for the Supreme Court to decide to resolve a constitutional issue and then allow its predecessors' wrongly decided rulings to control its judgment. When the Court does this, there are two ways to characterize its actions. On one view, the justices are asserting interpretive authority over a constitutional issue and then choosing, as a matter of policy, to follow a mistaken interpretation of their predecessors. Although pragmatists might comfortably embrace this rationalization for stare decisis, a textualist cannot. Once a textualist justice decides to interpret a disputed constitutional provision, he must interpret the Constitution according to textualist interpretive methodologies; he cannot decide to embrace the nontextualist decisions of his predecessors for policy reasons.

On another view, a court that chooses to invoke stare decisis is simply conferring interpretive finality on the opinions of its predecessors. But a textualist justice who treats his predecessors' rulings as binding and conclusive gloss will generate tension with Article V, which prevents federal institutions from amending the Constitution outside the supermajoritarian processes that the document establishes. When the Supreme Court treats its *institutional rivals'* interpretations of the Constitution as authoritative, those interpretations, even if mistaken, at least remain defeasible by the democratically accountable institutions that enacted them. Congress can repeal an unconstitutional statute; presidents can revoke unconstitutional policies or pronouncements. This is what distinguishes an erroneous constitutional interpretation from a de facto constitutional amendment: the institution that promulgated the interpretation retains the power to revoke it without using Article V's amendment process. If a court declines to invalidate an unconstitutional federal statute by invoking the political-questions doctrine or denying the propriety of judicial review, this decision will not produce a de facto constitutional amendment because the statute still remains subject to repeal by the ordinary political processes.[76]

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74. *See infra* notes 103–123 and accompanying text.

75. *See* Harrison, *supra* note 10, at 35 (noting that Article VI "does not give judicial opinions the interpretive supremacy that it gives to substantive federal law").

76. Some commentators argue that Article V requires the Supreme Court to exercise judicial review because enforcing unconstitutional statutes would produce de facto constitutional amendments. *See, e.g.*, Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 918 (2003) ("Without judicial review (or executive or legislative review, for that matter), the federal government would be able to circumvent Article V . . . . This would allow the government to effectively amend the Constitution without undergoing Article V's difficult supermajoritarian process."). This overlooks Congress's ability to

It's different when the Supreme Court decides that its *predecessors'* erroneous constitutional pronouncements represent the authoritative construction of the document, and then uses those precedents to nullify the decisions of elected officials. In these situations, the justices are interpreting the Constitution to entrench these earlier (mistaken) interpretations from repeal; they have foresworn their prerogative to correct their predecessors' mistakes by invoking stare decisis and equating the precedent with the authoritative exposition of constitutional meaning. Now the Court's wrongly decided precedent becomes more akin to a de facto constitutional amendment, as the justices claim that their earlier-decided ruling—even though mistaken—binds not only other government actors but also the justices themselves. It is important not to overstate this point; a future Supreme Court will still retain the prerogative to overrule the disputed precedent, even if today's Supreme Court declines to do so. But a textualist that interprets Article VI to foreclose this option causes himself to enforce a "constitutional" rule that never received the supermajoritarian pedigrees required by Articles V or VII, *and* that cannot be changed except through the extraordinary processes of constitutional amendment or (perhaps) new Supreme Court appointments. This construction of the Supremacy Clause is harder to square with Article V than the more benign practice of assigning interpretive authority to a rival federal institution that acknowledges its continuing prerogative to amend or revoke its constructions of the Constitution. All of these problems make this precedent-as-final-interpretation theory a challenging and difficult account for textualist jurists to embrace.

2. Interpreting Article III's Vesting Clause to Authorize Constitutional Stare Decisis

A number of textualist commentators maintain that Article III's Vesting Clause empowers the justices to invoke stare decisis and apply atextual or erroneous precedents as rules of decision in constitutional litigation. On this view, the provision that vests the Supreme Court with "the judicial Power of the United States"[77] implicitly authorizes the justices to employ stare decisis because English and colonial courts were known to follow precedent at the time of founding.[78] But several problems confront textualists who want to

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repeal an unconstitutional statute through the normal bicameralism-and-presentment processes, which distinguishes a mistaken congressional interpretation from a de facto constitutional amendment.

77. U.S. CONST. art. III, § 1.

78. *See, e.g.*, BORK, *supra* note 46, at 157 ("[A]rticle III vests the 'judicial Power' in the Supreme Court and lower federal courts. At the time of the ratification, judicial power was known to be to some degree confined by an obligation to respect precedent." (footnote omitted)); Amar, *supra* note 10, at 157 (arguing that Article III's Vesting Clause "envision[s] a system in which Article III tribunals will sit in judgment over events that have already occurred and will decide these cases, not by creating new rules, but by declaring the preexisting federal law that applied when the relevant litigation-creating events happened"); *see also* John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U.

adopt this Article III argument as their justification for constitutional stare decisis.

First, Article VI establishes a specific hierarchy of rules of decision for the courts to follow, ensconcing "[t]his Constitution," federal statutes, and treaties as "supreme" law while omitting judicial precedents from this exalted status. Article III's language is too vague to invert this rank by elevating an atextual or ahistorical Supreme Court precedent above a proper textualist interpretation of the document. The Vesting Clause speaks only of "the judicial Power," and does not purport to address the substantive laws or rules of decision that the federal courts would apply. The Supremacy Clause fills this gap and should bind the Supreme Court; its specific choice-of-law provisions cannot be trumped by the amorphous Vesting Clause language.

A more sophisticated variant of this Article III argument might try to use the Vesting Clause, and the English history that it arguably incorporates, as evidence that the "supreme" laws delineated in Article VI should be interpreted with an eye toward precedent. This approach aims to preserve rather than invert Article VI's hierarchy of laws. But it can secure only a limited, epistemic role for precedent—one that helps judges find the right answers to constitutional questions according to their interpretive commitments. A textualist who equates "[t]his Constitution" with the original meaning of its words will remain unable to enforce a nontextualist precedent over the "supreme Law of the Land," at least not without compromising his fidelity to textualist interpretive methodologies.

Second, the practices of English and colonial courts at the time of the founding have little bearing on whether Article III authorizes the justices to invoke stare decisis in *constitutional* litigation. Those courts acted under a regime of parliamentary omnipotence rather than constitutional supremacy.[79] And their practices of adhering to precedent in common-law and statutory cases, where judicial precedents are subject to legislative override, cannot supply a justification for stare decisis in constitutional litigation, where the Supreme Court's rulings can be changed only with constitutional amendments or new judicial appointments. Even Lord Coke's decision in *Dr. Bonham's Case*,[80] which suggested that established common-law customs could trump a later-enacted act of Parliament,[81] comes nowhere close to suggesting that a court's post-ratification deviations from a written

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L. REV. 803, 823–25 (2009) (arguing that Article III's Vesting Clause requires the justices to give some weight to precedent).

79. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES 91 (Clarendon Press 1765) ("[I]f the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it . . . ."); *id.* at 156 ("[Parliament is] the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms.").

80. 77 Eng. Rep. 646, 8 Co. Rep. 114a (C.P. 1610).

81. *Id.* at 652; 8 Co. Rep. at 118a ("[I]n many cases, the common law will . . . controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.").

Constitution can prevail over the document's original understanding.[82] And in all events, it is questionable to assume that Article III's Vesting Clause would implicitly incorporate all of the practices of English and colonial courts, especially a controversial practice like stare decisis. The colonial courts were a major source of the grievances listed in the Declaration of Independence,[83] and they provided the impetus for many of the Constitution's explicit protections against judicial abuses, including life tenure, salary protection, the right of jury trial, a definition of treason, and Article VI's provision for constitutional supremacy.

Third, the reporting of court decisions was poor at the time of the Constitution's ratification. Congress did not authorize an official reporter for Supreme Court decisions until 1817.[84] And the early Supreme Court initially followed the British practice of seriatim opinions; only later, under Chief Justice Marshall, did the justices coalesce behind a single opinion of the Court that could serve as authoritative precedent.[85] All of this further dampens any possibility that the original meaning of Article III's Vesting Clause licensed the robust stare decisis norms that the Supreme Court regularly employs in modern constitutional litigation, where widely disseminated opinions for the Court establish broad principles that purport to control future judicial decisionmaking.

3. Stare Decisis as a Heuristic

Finally, Professor Schauer argues that textualists who acknowledge the epistemic value of Supreme Court precedent in finding the right answer to disputed constitutional questions may also treat these past constitutional pronouncements as authoritative rules of decision.[86] On this view, stare decisis functions as a rule of thumb that treats "all cases coming from a particular source as presumptively persuasive."[87] This approach reconceptualizes stare decisis as a decisionmaking strategy for textualist jurists. Rather

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82. Scholars debate whether Coke's views accurately reflected English common-law practices, but Coke undoubtedly influenced American constitutional thought. *See, e.g.*, Joyce Lee Malcolm, *Whatever the Judges Say It Is? The Founders and Judicial Review*, 26 J.L. & POL. 1, 13–15 (2010) (discussing Coke's influence on the founders).

83. *See* THE DECLARATION OF INDEPENDENCE paras. 10–11 (U.S. 1776).

84. *See* Harrison, *supra* note 10, at 43–45; *see also* William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 476, 478, 519–20 (2005) (describing revolutionary-era state-court cases that were published only in newspapers accounts).

85. *See* Ruth Bader Ginsburg, Lecture, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 2–3 (2010).

86. *See* Frederick Schauer, *Precedent and the Necessary Externality of Constitutional Norms*, 17 HARV. J.L. & PUB. POL'Y 45 (1994).

87. *Id.* at 49; *see also id.* ("[I]t is hard to see that anything in the Constitution permits case-by-case persuasion by prior judicial actions but prohibits less case-specific persuasion by prior judicial actions. . . . This, of course, is just what stare decisis is—the imposed assumption, without retail inspection, that decisions from some source are likely to be followed because of ex ante presuppositions about their likely content, such as the presupposition that earlier cases were likely to have been decided correctly.").

than inverting the hierarchy of laws established in Article VI, or treating past Court majorities as final expositors of constitutional meaning, Professor Schauer rationalizes stare decisis as a decision costs–reducing shortcut for textualist judges who seek to interpret the Constitution in good faith while dealing with their limited institutional capacities and the scarcity of judicial time and resources.[88] Professor Nelson offers a similar theory of stare decisis, in which the Supreme Court's constitutional precedents control only when they offer plausible (even if mistaken) interpretations of the Constitution. This approach allows (but does not compel) the justices to overrule their "demonstrably erroneous" constitutional precedents.[89]

All theories of judging must acknowledge that judges decide cases under feasibility constraints—even textualist judges must trade off decision costs against error costs.[90] Judicial resources run out before a judge can be assured that his decision comports with his first-order interpretive commitments, leading judges to resort to heuristics and tiebreaking mechanisms such as evidentiary presumptions or canons of construction.[91] And it is easy to see how pragmatists, who typically strive to minimize the sum total of decision costs and error costs in judicial decisionmaking,[92] would want to embrace stare decisis as a device that can dramatically reduce the decision costs of constitutional litigation while producing only a small uptick in error costs—although these calculations ultimately depend on some difficult-to-resolve empirical questions as well as a theory of what constitutes "correct" judicial decisionmaking.

But a textualist jurist cannot easily invoke the need to conserve decision costs to justify constitutional stare decisis. First, few if any textualists regard decision costs as commensurate with error costs in constitutional litigation. From a textualist standpoint, a constitutional ruling that incurs error costs can cause the Supreme Court to exceed the scope of its legitimate power. A decisionmaking strategy that involves increased decision costs, by contrast, will lead to different types of harms, such as reducing judicial leisure or diverting judicial time away from other cases, which may or may not increase the likelihood of errors in those cases. Pragmatists will have an easier time embracing decisionmaking strategies that trade off decision costs against error costs in constitutional litigation; most textualists will want to minimize constitutional error costs as far as possible before resorting to heuristics or tiebreakers.

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88. *See generally* Cass R. Sunstein & Edna Ullman-Margalit, *Second-Order Decisions*, 110 ETHICS 5, 7 (1999) (discussing and clarifying the choices among "second-order decisions," the "decisions about the appropriate strategy for reducing the problems associated with making a first-order decision").

89. *See* Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 53 (2001).

90. *See infra* Part III.

91. *See generally* VERMEULE, *supra* note 23; Adam M. Samaha, *On Law's Tiebreakers*, 76 U. CHI. L. REV. 1661 (2010).

92. *See* Sunstein, *supra* note 29, at 647.

Second, even when a textualist needs heuristics to resolve difficult constitutional issues, an approach that categorically assumes the correctness of the Supreme Court's precedents is unlikely to produce reliable answers. With so many atextual and ahistorical precedents on the books, constitutional stare decisis seems an exceptionally poor decisionmaking strategy for textualists seeking to minimize error costs within the institutional constraints that they face. A better approach would limit constitutional stare decisis to opinions written by textualist Supreme Court justices, or consult the academic writings of textualist commentators to determine whether a precedent should be followed.

Third, many of the Supreme Court's precedents are demonstrably mistaken as a matter of original meaning and textualist jurists nevertheless adhere to them on stare decisis grounds. These include the Court's exclusionary-rule edicts,[93] the Warren Court's use of the Equal Protection Clause to protect voting rights,[94] and modern Establishment Clause jurisprudence.[95] A textualist jurist cannot credibly invoke the need to resort to heuristics or rules of thumb as a justification for following *these* decisions; it requires hardly any time or research to conclude that these rulings are manifestly incompatible with a textualist's interpretive commitments. And although Professor Nelson allows that the justices might adhere to even a demonstrably erroneous prior decision if they can find "some special reason to adhere to it,"[96] he does not explain how the text of the Constitution could ever permit the justices to elevate these raw consequentialist considerations over faithful interpretation of the document.

B. *Stare Decisis and the Supremacy Clause*

All of these theories of constitutional stare decisis seek to reconcile the Court's stare decisis practices with the Constitution's language, but none of them provides an entirely satisfying account for those who embrace textualist interpretive commitments. On top of that, none of these accounts limits a justice's discretion to follow or overrule an erroneous constitutional precedent. Each of these theories offers little more than a vague balancing test, making it impossible to falsify a justice's preference for preserving or reversing his predecessors' mistaken constitutional pronouncements.

This section will place constitutional stare decisis on a more secure textual footing by relying on the very provision that the textualist critics of stare decisis invoke for their attacks—the Supremacy Clause. The next four

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93. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 20–31 (1997).

94. *See* Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 110 (2000) ("[I]t is clear—a word that can rarely be used in this field of law—that the Equal Protection Clause was not originally understood by its framers to encompass voting rights.").

95. *See* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 481 (2002) ("[T]he constitutional authority for separation [of church and state] is without historical foundation.").

96. *See* Nelson, *supra* note 89, at 5.

subsections examine the constitutionality of stare decisis in four discrete categories of cases. Sections II.B.1 and II.B.2 consider whether the Constitution permits textualist justices to invoke stare decisis when rejecting or sustaining constitutional challenges to federal statutes or treaties. Sections II.B.3 and II.B.4 explore whether textualists may invoke precedent when considering constitutional challenges to state laws. To simplify the analysis, this section will bracket questions of institutional capacities and assume that judges can distinguish correct and mistaken precedents with perfect accuracy. It aims only to demonstrate the circumstances in which the Supremacy Clause might constrain the use of stare decisis in constitutional litigation. Part III will then consider the implications of this theory in light of institutional realities, when Supreme Court justices may be uncertain or mistaken over whether a constitutional precedent is right or wrong, and consider appropriate decisionmaking strategies for textualist judges who encounter the inevitable feasibility constraints that afflict all interpretive methodologies.

1. Invoking Precedent to Uphold a Federal Statute

Wickard v. Filburn[97] holds that Congress's Article I commerce powers allow it to regulate the consumption of homegrown wheat, even when no sales or transactions occur. Many have criticized this ruling for giving Congress near-plenary power over the economy, which is hard to reconcile with the limited language of the Commerce Clause.[98] What's more, historical evidence shows that many understood "commerce" to exclude "agriculture" at the time the Constitution was ratified.[99] And the southern states never would have ratified the Constitution if the commerce power had been understood to allow Congress to abolish slavery within their borders.[100] Let us assume, solely for the sake of argument, that *Wickard* misinterpreted the scope of the federal commerce power. The question is whether the Constitution allows a justice to uphold the federal Controlled Substances Act in *Gonzales v. Raich*[101] merely by invoking *Wickard* and treating it as dispositive of the litigants' federal constitutional claims.

At first glance, this type of disposition in *Raich* seems to be a paradigmatic violation of the Supremacy Clause. The justices allow one of their precedents, a nonsupreme rule of decision (and an erroneous one at that), to control the outcome at the expense of the Constitution itself—the supreme law of the land.[102] But this view is too simplistic in cases where the justices *uphold* an act of Congress against constitutional challenge. Even if one

97. 317 U.S. 111 (1942).

98. *See* Epstein, *supra* note 39, at 1451 ("Could anyone say with a straight face that the consumption of homegrown wheat is 'commerce among the several states?' "); *see also* United States v. Lopez, 514 U.S. 549, 584–602 (1995) (Thomas, J., concurring).

99. *See* Barnett, *supra* note 41, at 101–02.

100. *See* Richard A. Epstein, Propter Honoris Respectum, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 170 (1996).

101. 545 U.S. 1 (2005).

102. *See* Lawson, *Mostly Unconstitutional*, *supra* note 11, at 6.

accepts the textualists' interpretive premises, which equate "[t]his Constitution" with the original public meaning of its words, the Supremacy Clause still does not compel the justices to invalidate every federal statute that contravenes a federal constitutional provision.

Start with the text of Article VI's Supremacy Clause. It establishes three categories of "supreme" laws: "[t]his Constitution," the "Laws of the United States which shall be made in Pursuance thereof," and "all Treaties made, or which shall be made, under the Authority of the United States." This means that federal statutes are as "supreme" as the Constitution—provided that they are "made in Pursuance" of the Constitution. But the "made in Pursuance thereof" caveat is ambiguous: it might mean that federal statutes are "supreme" only when the Supreme Court deems them consistent with the substantive constitutional constraints on Congress's powers, or it might confer supremacy on any statute that survives the bicameralism-and-presentment procedures that the Constitution requires for congressional lawmaking.[103] Many textualists simply assume that the former construction is correct, largely because *Marbury v. Madison* asserted that the "made in pursuance" language excludes from supremacy acts of Congress that the Supreme Court deems unconstitutional,[104] a view that not only authorizes but *obligates* the justices to subordinate federal statutes to their own interpretations of the Constitution. But because this understanding of *Marbury* has become a habit of thinking among judges and lawyers alike, it is easy to overlook the textual problems that confront this interpretation of the Supremacy Clause.

First, the "made in Pursuance thereof" caveat attaches only to acts of Congress and not treaties, and it does not seem tenable to think that Article VI would compel the Supreme Court to subordinate federal statutes that it deems unconstitutional yet withhold a similar obligation to nullify unconstitutional treaties. Treaties, unlike federal statutes, are "supreme" so long as they are made "under the Authority of the United States"; this discrepancy was designed to preserve the supremacy of treaty obligations undertaken during the Articles of Confederation.[105] This implies that the "made in Pur-

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103. During Pennsylvania's ratification convention, for example, Robert Whitehill argued that federal statutes could be made "in pursuance" of the Constitution so long as they survived the bicameralism-and-presentment processes. *See* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: PENNSYLVANIA 513 (Merrill Jensen ed., 1976) [hereinafter DOCUMENTARY HISTORY VOLUME 2]. James Wilson, by contrast, disagreed with this construction of the Supremacy Clause and insisted that federal courts would nullify unconstitutional congressional enactments. *Id.* at 517.

104. 5 U.S. (1 Cranch) 137, 180 (1803); *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819) (construing "in pursuance thereof" to require compliance with Constitution's substantive restrictions on federal power).

105. *See, e.g.*, Reid v. Covert, 354 U.S. 1, 16–17 (1957) (plurality opinion) ("[T]he reason treaties were not limited to those made in 'pursuance' of the Constitution was so that agreements made by the United States under the Articles of Confederation, including the important peace treaties which concluded the Revolutionary War, would remain in effect."). The *Reid* plurality opinion went on to insist that treaties, like statutes, must comport with the Supreme Court's interpretation of the Constitution. *Id.* at 17.

suance thereof" language excludes only the federal statutes enacted before the Constitution's ratification, and that acts of Congress qualify as supreme law so long as they postdate the Constitution and surmount the bicameralism-and-presentment hurdles in Article I, Section 7.[106] What's more, Article I, Section 7 provides that a bill attains the title of "law" once it successfully runs the bicameralism-and-presentment gauntlet; it does not make this status contingent on whether the statute comports with the Constitution's substantive provisions—or the justices' interpretations of them.[107]

Second, even if it were correct to insist that the Supremacy Clause, or perhaps some structural inference from the Constitution, requires federal statutes to comply with the Constitution's substantive provisions,[108] it is hard to accept the additional claim that the Supreme Court's interpretations of those provisions must always trump the constitutional interpretations adopted by the national political branches. Chief Justice Marshall, of course, famously declared in *Marbury* that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[109] But that is a conclusion, not an argument; Marshall begs the question and baldly asserts that the Supreme Court's interpretations of constitutional provisions should prevail over Congress's, rather than the other way around.[110] It is equally plausible to conclude that the electorate, rather than the Supreme Court, should judge the constitutionality of congressional statutes, and remedy violations by electing new representatives who will repeal the unconstitutional

106. *See, e.g.*, CURRIE, *supra* note 13, at 72–73 (noting that the Supremacy Clause "embraces treaties made both before and after adoption of the Constitution" and that "the contrast strongly suggests that the reference to laws made in pursuance of '*this* Constitution' was meant to distinguish those made under the Articles of Confederation" (footnotes omitted)); Klarman, *supra* note 13, at 1119 ("[T]he Framers probably intended 'in Pursuance thereof' to signify a temporal rather than a logical connection.").

107. Article I, Section 7 establishes three processes by which a bill becomes law. The first is approval by each house of Congress followed by the president's signature; the Constitution requires presentment to the president "before it become a Law." U.S. CONST. art. I, § 7, cl. 2. The second is a two-thirds vote in each house to override a presidential veto; after this happens, it "shall become a Law." *Id.* The third involves approval by each house and the president allows it to become law without his signature; when this occurs, it "shall be a Law." *Id.*

108. *See, e.g.*, PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 596 (2008) (acknowledging that the text of the Supremacy Clause does not "stipulate the relative supremacy of the Constitution over federal statutes and treaties" yet insisting that the Constitution's supremacy over federal statutes "could be taken for granted").

109. *Marbury*, 5 U.S. (1 Cranch) at 177.

110. Many commentators have criticized this question-begging fallacy in the *Marbury* opinion. *See* BICKEL, *supra* note 13, at 2–3; CURRIE, *supra* note 13, at 71 n.49; VERMEULE, *supra* note 23, at 234; Harrison, *supra* note 69, at 334; Van Alstyne, *supra* note 13, at 21. Perhaps Marshall's rejection of congressional supremacy is rooted in an intuition that foxes should not guard henhouses, but the president's veto already protects against congressional self-aggrandizement, and in all events *Marbury*-style judicial supremacy presents the reciprocal danger of empowering the justices to expand their own constitutional powers at the expense of the other branches.

enactments.[111] In Federalist No. 33, for example, Hamilton rejected the notion that unconstitutional federal statutes could qualify as "the supreme law of the land,"[112] but he also stated that the people rather than the courts were responsible for redressing the constitutional violation.[113] Only later, in Federalist No. 78, did Hamilton acknowledge judicial review as a possible remedy for unconstitutional federal statutes, and this was to refute an anti-Federalist's claims that the Constitution conferred far-reaching powers on federal judges to nullify democratically enacted legislation.[114] Of course, what Hamilton actually believed about judicial review is not controlling; the point is only that his analysis in Federalist No. 33 demonstrates how the Supremacy Clause need not be read to obligate the Supreme Court to nullify unconstitutional federal statutes—even if one believes (as Hamilton did) that Article VI excludes unconstitutional congressional enactments from the "supreme Law of the Land."

Third, the Constitution establishes three coordinate and independent branches of the federal government. It is difficult to reconcile that constitutional structure with a Supreme Court that categorically elevates its interpretations of the Constitution over the constructions that its rival branches adopt when enacting federal statutes.[115] Indeed, if the Supreme Court has free rein to reject federal statutes that it deems unconstitutional,

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111. *See, e.g.*, Eakin v. Raub, 12 Serg. & Rawle 330, 355 (Pa. 1825) (Gibson, J., dissenting) (rejecting judicial review and insisting that "it rests with the people, in whom full and absolute sovereign power resides, to correct abuses in legislation, by instructing their representatives to repeal the obnoxious act"); Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20, 77 (1793) (opinion of Tucker, J.) ("[T]he constitution of a state is a rule to the *Legislature only* . . . ."); *see also* Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We The Court*, 115 HARV. L. REV. 5, 48–49 (2001) (arguing that ultimate interpretive authority over the Constitution rests with the people, who can check unconstitutional legislation by removing their elected representatives).

112. *See* THE FEDERALIST No. 33, at 175 (Alexander Hamilton) (ABA 2009) ("[I]t will not follow from [the Supremacy Clause] that acts of the larger society which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation . . . .").

113. *Id.* ("If the federal government should overpass the just bounds of its authority . . . the people, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence justify.").

114. *See* BRUTUS XV (1788), *reprinted in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 304, 307 (Ralph Ketcham ed., Mentor 1986) (arguing that the Constitution had authorized the justices to nullify legislation based "not only according to the natural and ob[vious] meaning of the [Constitution's] words, but also according to the spirit and intention of it"); *see also* Kramer, *supra* note 111, at 67–68 (explaining how Brutus's essay provided the context for Federalist No. 78); Shlomo Slonim, *Federalist No. 78 and Brutus' Neglected Thesis on Judicial Supremacy*, 23 CONST. COMMENT. 7 (2006) (same).

115. *See, e.g.*, THE FEDERALIST No. 49, at 285 (James Madison) (ABA 2009) ("The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers.").

one must wonder why the president and Congress are not equally entitled to disregard the Supreme Court judgments that they consider repugnant to the Constitution. Yet the justices expect and demand that their decisions be enforced and obeyed, no matter how strongly the political branches disapprove of their constitutional reasoning. In this world of judgment finality, the justices should allocate interpretive authority over the Constitution in a manner that respects the stature of the other branches as coordinate and independent branches. There are many possible ways in which this could be done. Prior to *Marbury*, most state and federal courts limited their judicial-review prerogatives to laws directly affecting the judiciary, such as laws defining the authority of juries or the jurisdiction of the courts.[116] Outside of that area, both state and federal courts declined to second-guess the political branches' interpretations of constitutional provisions.[117] Justice Story's *Commentaries on the Constitution* sketches another approach to the allocation of interpretive authority. While Story strongly endorsed judicial supremacy and the binding nature of the Supreme Court's judgments and opinions,[118] he simultaneously cut a wide swath for the political-questions doctrine, arguing that the political branches' decisions regarding the scope of the taxing, spending, commerce, and treaty powers should be final and nonreviewable in court.[119] All of this indicates that textualists need not construe Article VI to *require* nullification of every act of Congress that contradicts the original meaning of a constitutional provision. Rather, the Supremacy Clause permits the justices (and presidents) to treat at least some federal statutes as the final and authoritative exposition of the Constitution's meaning.[120] These hybrid

116. *See, e.g.*, Treanor, *supra* note 84, at 455 (collecting authorities).

117. *Id.*; *see also* BICKEL, *supra* note 13, at 7. This early judicial practice mirrors the modern presidents' selective use of their nonenforcement prerogatives, where they (generally) enforce and defend all federal statutes unless they infringe the constitutional powers of the executive branch.

118. *See* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION § 383 (Melville M. Bigelow ed., Little, Brown, & Co. 5th ed. 1905) (1833) (asserting that the federal judiciary's interpretation of the Constitution "becomes obligatory and conclusive upon all the departments of the Federal government, and upon the whole people, so far as their rights and duties are derived from, or affected by that Constitution").

119. *Id.* § 374 (arguing that the scope of these powers involves "measures exclusively of a political, legislative, or executive character," and insisting that "the supreme authority, as to these questions, belongs to the legislative and executive departments, they cannot be re-examined elsewhere"); *id.* ("[T]hese powers can never become the subject of re-examination in any other tribunal.").

120. Article V, of course, indicates that Congress cannot amend the Constitution with simple lawmaking, and some have suggested that this provision counsels in favor of broad, *Marbury*-style judicial review. *See, e.g.*, Harrison, *supra* note 69, at 347–48. But a Supreme Court ruling that sustains an unconstitutional federal statute will not establish a de facto constitutional amendment because Congress always retains the prerogative to repeal that statute through the ordinary bicameralism-and-presentment processes. Attributing finality to a federal statute's interpretation of a constitutional provision is no more constitutionally objectionable than the political branches' longstanding practice of respecting the finality of federal-court

approaches respect Congress and the executive as coordinate branches by vesting them with final interpretive authority over the Constitution in at least some (though not all) situations.

Finally, other constitutional provisions make it hard to infer that the Constitution compels the justices to invalidate every unconstitutional federal statute that they encounter. To begin, the document gives the federal judiciary only partial independence from Congress and the president. Article III judges may enjoy life tenure and salary protection, but the national political branches still retain control over the appointment process to the courts, the jurisdiction of the courts, the number of seats on the courts, the appropriations for staffing the courts, any decisions to increase judicial salaries, and, finally, the impeachment process. Interpreting the Constitution to require Supreme Court justices to nullify every federal statute that they deem repugnant to the Constitution—without any regard for the views of Congress—would make judicial review self-defeating. Eventually, the national political branches will respond by using their appointment prerogatives and other powers to bring the Court more into line with their views.[121] Indeed, the Court throughout its history has shown forbearance when reviewing congressional legislation. The justices upheld the Jeffersonians' decision to repeal the 1801 Judiciary Act even though Chief Justice Marshall and Justice Chase privately believed it to be unconstitutional,[122] and the Supreme Court failed to nullify any congressional legislation in the years between *Marbury v. Madison* and *Dred Scott v. Sanford*. In addition, the Supreme Court cannot even opine on the constitutionality of federal legislation until an Article III case or controversy reaches its docket. A Constitution that mandates robust, autonomous judicial review of congressional enactments would do more to ensure the courts' involvement earlier in the process, before the disputed legislation engenders reliance interests that may complicate the Court's task.[123]

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judgments, even when they believe them to rest on mistaken interpretations of the Constitution.

121. *See* Adrian Vermeule, *Judicial Review and Institutional Choice*, 43 WM. & MARY L. REV. 1557, 1561 (2002) (noting the view that judicial review does not invalidate federal statutes, but merely delays their effectiveness "until the process of presidential appointment aligns the Court's holdings with the nation's wishes").

122. *See* Letter from Justice Marshall to Justice Paterson (Apr. 6, 1802), *in* 6 THE PAPERS OF JOHN MARSHALL 105, 106 (Charles F. Hobson ed., 1990) (questioning the constitutionality of the repealing statute); Letter from Justice Marshall to Judge William Cushing (Apr. 19, 1802), *in* 6 THE PAPERS OF JOHN MARSHALL, *supra*, at 108, 108 (expressing "more than doubt" regarding the constitutionality of the repealing statute); Letter from Justice Chase to Justice Marshall (Apr. 24, 1802), *in* 6 THE PAPERS OF JOHN MARSHALL, *supra*, at 109, 109–16 (opining that the repealing statute was unconstitutional).

123. *See, e.g.*, James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 136–37 (1893) ("As the opportunity of the judges to check and correct unconstitutional Acts is so limited, it may help us to understand why the extent of their control, when they do have the opportunity, should also be narrow."). For a different view of the pervasiveness and value of preventive adjudication, see Samuel L. Bray, *Preventive Adjudication*, 77 U. CHI. L. REV. 1275 (2010).

The sounder textualist interpretation of Article VI permits the justices to enforce at least some acts of Congress that they believe to be unconstitutional—either by respecting certain acts of Congress as the final and authoritative construction of constitutional provisions, or by conferring "supremacy" on statutes that survive the bicameralism-and-presentment processes (leaving textualist justices with freedom to decide whether to enforce the original meaning of the "supreme" Constitution or the "supreme" federal statutes). None of this implies that the Constitution categorically forbids judicial review of federal statutes, nor does it mean that *Marbury* was wrongly decided. Constitutional rules imply enforcement mechanisms, and one can reasonably infer that the Constitution at least permits the Supreme Court (as well as the president) to disregard federal statutes that they deem unconstitutional as an incident to their powers to resolve cases (or to faithfully execute the laws). The Constitution lacks any provision that explicitly enshrines acts of Congress as final and binding pronouncements of constitutional meaning,[124] and there are many statements from delegates at the federal convention and the state ratifying conventions, as well as members of the First Congress, assuming or approving the notion that courts would review the constitutionality of federal statutes (although not everyone shared this view).[125] But there is a great distance between the

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124. *See* THE FEDERALIST NO. 78, at 451 (Alexander Hamilton) (ABA 2009) ("If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution."); Harrison, *supra* note 69, at 333 (defending judicial review after concluding that no constitutional provision compels courts or the executive to treat all federal statutes as authoritative constructions of the Constitution).

125. *See, e.g.*, DOCUMENTARY HISTORY VOLUME 2, *supra* note 103, at 517 (recording James Wilson's remarks at the Pennsylvania ratifying convention, which insisted that the courts would "declare . . . void" any congressional enactment that exceeded the federal government's powers); 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: VIRGINIA 1431 (John P. Kaminski & Gaspare J. Saladino eds., 1993) (recording John Marshall's statement at the Virginia ratifying convention predicting that courts would "declare . . . void" an unconstitutional federal statute). When the members of the First Congress debated the "Decision of 1789" regarding the scope of the president's removal power, as well as the 1789 Judiciary Act, they assumed that the courts would independently assess the constitutionality of their legislation. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 97 (Max Farrand ed., rev. ed. 1937) (noting that Elbridge Gerry opposed the proposed Council of Revision in the Virginia Plan, on the ground that federal judges "will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality"); *see also* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801, at 120 (1997) ("Repeatedly and without contradiction, members of the First Congress acknowledged that the constitutionality of their actions would be subject to judicial review.").

At least two delegates to the Philadelphia convention disapproved the notion of judicial review. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 298 (noting Francis Mercer's disapproval of "the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void"); *id.* at 299 (noting that John Dickenson "thought no such power [of judicial review] ought to exist"). These disagreements, as well as the controversies surrounding state courts that deployed judicial review prior to the Constitution, may explain why the written Constitution never explicitly endorses or repudiates judicial review of

acknowledgement that the Constitution *allows* for judicial review and the misguided insistence that it *compels* the justices to nullify every federal statute that contravenes the Constitution. Unlike the explicit Article VI obligation to review the constitutionality of state laws, the power to disregard a federal statute on constitutional grounds is a discretionary and implied power rather than a mandatory and explicit one. The same is true of the president's nonenforcement power over federal statutes; the Constitution may permit the president to cease enforcing congressional enactments that he deems unconstitutional, but presidents do not violate the Constitution or their Oath of Office if they choose to enforce and defend all acts of Congress—even when they sincerely believe that a statute contravenes the Constitution.[126] Indeed, the Constitution would become a suicide pact if it obligated the president and the justices to ignore the views of Congress and plow ahead with their autonomous constructions of constitutional provisions; the Constitution gives Congress too many weapons to check these institutions when they elect to ignore congressional legislation, and the branches would be at continual war with each other. Instead, the text and structure of the Constitution set the stage for the three coordinate branches to reach accommodations over the allocation of interpretive authority.

A textualist Supreme Court justice must therefore devise a method for resolving cases that present conflicts between the original meaning of the "supreme" Constitution and a "supreme" act of Congress.[127] Article VI does not compel the Supreme Court to invalidate every federal statute that contradicts its understanding of the Constitution, and it permits textualist jurists to sort the cases in which they will treat the federal statute as the final and authoritative exposition of the Constitution's meaning from those in which they will impose their textualist interpretations of the Constitution against the interpretations adopted by Congress. And this is where stare decisis comes into play. Returning to *Wickard* and *Raich*, an original-meaning textualist may be certain that *Wickard* erred yet still vote to reject the constitutional challenge in *Raich*—and maintain fidelity to the written document—by adopting the following rationale:

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congressional enactments, leaving the matter largely to inference. *Cf.* U.S. CONST. art. VI (explicitly requiring courts to subordinate state law to the Constitution).

126. Some departmentalists insist that the president's Oath of Office forbids him to defer to the constitutional interpretations adopted by Congress or the Supreme Court and obligates a president to interpret the Constitution de novo when deciding whether to enforce a federal statute. *See, e.g.*, Gary Lawson, *Everything I Need to Know About Presidents I Learned from Dr. Seuss*, 24 HARV. J.L. & PUB. POL'Y 381 (2001). But nothing in the president's Oath of Office compels the president to exercise independent interpretive authority over the Constitution. Like the Constitution itself, the Oath is silent on how to allocate final interpretive authority over the Constitution among the three branches of the federal government. Many different approaches can be squared with the constitutional text and with the Oath.

127. *See, e.g.*, Kramer, *supra* note 111, at 13 ("Nothing in the doctrine of judicial supremacy . . . [denies] legitimate interpretive authority on political actors as a means of ensuring continued popular input in shaping constitutional meaning. The trick, of course, is to find the proper balance, a problem courts have struggled with throughout American history.").

> I do not believe that the Constitution, properly construed, authorizes Congress to regulate the wholly intrastate consumption of home-grown agricultural products. And the Constitution, of course, is the supreme law of the land; it must prevail over anything we have said in our prior opinions. But the Constitution does not obligate courts to nullify every unconstitutional federal statute. First, Article VI designates federal statutes as "supreme" law, and, second, these congressional enactments represent the constitutional interpretations of a coordinate branch. So I must therefore decide which of these "supreme" laws should prevail in this case, or, to put it another way, whether the courts or the national political branches should have the final word on the constitutionality of this statute. Our stare decisis doctrines provide a constitutionally permissible and publicly acceptable means of breaking this deadlock, and overturning *Wickard* would destabilize the law and undermine reliance interests. So I will in this case opt to enforce the "supreme" federal statute—the interpretation of the Commerce Clause adopted by the national political branches—over the equally "supreme" original meaning of the Commerce Clause.

A textualist justice may therefore invoke stare decisis to uphold a federal statute—even a statute that conflicts with the Constitution's original meaning—without violating his interpretive commitments. This practice is troubling only for those who assume that the Constitution obligates the justices to subordinate acts of Congress to their constitutional interpretations; if one accepts this assumption, a textualist cannot accommodate stare decisis in these situations without surrendering to legal pragmatism. But the text of the Constitution imposes no such requirement on the justices.

To be sure, this rationalization of stare decisis creates some tension with the Supreme Court's opinion in *Marbury*, which assumed that the Supreme Court's interpretations of the Constitution must prevail over a contrary act of Congress. But this does not undermine the legality of stare decisis. First, although the justices must obey the written Constitution, they are not obligated to follow the interpretive gloss that they place on it. Supreme Court opinions are not listed among the "supreme" laws described in Article VI—they are, after all, called *opinions*—and the Supreme Court has always retained the prerogative to modify, trim, or overrule its earlier pronouncements.[128] Indeed, numerous aspects of the *Marbury* opinion (apart from its discussion of judicial review) have already been repudiated by the Supreme Court.[129]

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128. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003).

129. *Compare* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 392–405 (1821) (holding that Congress may confer appellate jurisdiction on the Supreme Court even in cases where Article III, § 2 provides for original jurisdiction in the Supreme Court), *with Marbury*, 5 U.S. (1 Cranch) at 174 (holding that Article III forbids Congress either to give the Supreme Court original jurisdiction where the Constitution provides for appellate, or to give it appellate jurisdiction where the Constitution provides for original); *compare* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 88–102 (1998) (forbidding Article III courts to resolve disputed questions of law when subject-matter jurisdiction is in doubt), *with Marbury*, 5 U.S. (1 Cranch) at 154–68 (reaching the merits of the dispute and holding that the Jefferson

Second, the proper scope of the *Marbury* power remains in flux; the justices are constantly tussling over the extent of their power to invalidate unconstitutional federal statutes. Sometimes this is explicit, as in the debates over the "political-questions doctrine" or the "political safeguards of federalism."[130] Numerous cases now recognize that the national political branches have the final say in many areas of constitutional interpretation,[131] such as the division of war powers between Congress and the president[132] and the meaning of the Republican Form of Government Clause.[133] Other times this is implicit, as in cases where textualist justices invoke stare decisis to uphold a federal statute that contravenes the original meaning of constitutional text. Any Supreme Court opinion that invokes stare decisis to uphold a federal statute against constitutional challenge can be translated to say: "We think this federal statute might contravene a constitutional provision, but we need not resolve that question because the Constitution permits us to enforce Congress's interpretation of the Constitution in this case." On this view, stare decisis is no different from a tacit expansion of the political-questions doctrine, a ruling that grows the domain of interpretive questions to be resolved authoritatively by the national political branches. A textualist can embrace this role for stare decisis without compromising his interpretive commitments.

Some may think that this theory of stare decisis proves too much. If the text of the Constitution allows the justices to expand or contract the scope of the *Marbury* power based on the consequentialist considerations that undergird stare decisis doctrines, then this prerogative should exist in every case presenting constitutional challenges to federal statutes, regardless of whether stare decisis is in play. Even in a case of first impression, a textualist might want to reject a constitutional challenge to an unconstitutional federal statute merely because he wants to avoid impeachment or public backlash, or because he likes the statute as a policy matter. All of these seemingly law-

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Administration unlawfully withheld Marbury's commission, and only later resolving whether the Supreme Court could exercise jurisdiction over the controversy).

130. *Compare* United States v. Morrison, 529 U.S. 598, 628–55 (2000) (Souter, J., dissenting), *and* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 530–57 (1985), *with Morrison*, 529 U.S. at 610–27 (majority opinion), *and Garcia*, 469 U.S. at 580–89 (O'Connor, J., dissenting). In his *Morrison* majority opinion, Chief Justice Rehnquist accused his dissenting colleagues of retreating from *Marbury* by embracing the "political safeguards of federalism" theory. Rehnquist was right to characterize the "political safeguards" rationale as a retreat from *Marbury*, but he was wrong to suggest that there was anything lawless about that. Stare decisis likewise represents a retreat from *Marbury* when invoked to uphold an unconstitutional federal statute. Each of these practices is lawful because the justices need only obey the written Constitution, not the Supreme Court's earlier pronouncements, and the document does not obligate the justices to nullify unconstitutional federal statutes.

131. *See* Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1283–85 (2001) (documenting the categories of constitutional interpretive questions that are vested in political branches rather than courts).

132. *See* Mitchell v. Laird, 488 F.2d 611, 616 (D.C. Cir. 1973); Campbell v. Clinton, 203 F.3d 19, 24–28 (D.C. Cir. 2000) (Silberman, J., concurring).

133. Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 147–51 (1912).

less dispositions could be rationalized as decisions that merely tweak the scope of *Marbury*. And if textualism licenses the Supreme Court to turn aside *any* constitutional challenge to a federal statute, then it would seem to confer a discretionary power even greater than the latitude provided by conventional stare decisis doctrines—at least in the subset of cases involving federal statutes that conflict with the Constitution.

But the Supreme Court operates under other constraints—both practical and legalistic—that prevent this theory of stare decisis from degenerating into a regime where the justices uphold federal statutes whenever they please. First, the Supreme Court must supply reasons when it decides cases, and public obedience to the Court depends on the justices' ability to defend their rulings with publicly acceptable rationales.[134] When the Court invokes stare decisis to uphold an act of Congress, it is claiming that its previous ruling suffices to reject the constitutional challenge, regardless of whether the federal statute actually conflicts with a proper interpretation of the Constitution. Reasoning from precedent in this manner has become an accepted justification for legal decisionmaking; it also comports with textualist understandings of the Constitution because judicial review of federal statutes is a discretionary rather than mandatory power. Although it is possible to imagine other constitutionally permissible algorithms for deciding when to invoke the *Marbury* power, they will not be implemented if they would undermine the Court's stature or credibility.

Second, even when the Constitution leaves the Supreme Court with a discretionary power, it does not follow that the justices may exercise that power in a nakedly political or results-oriented manner. Implicit in "the judicial power,"[135] and explicit in the judicial Oath,[136] is a prohibition on arbitrary or results-driven judging, as well as an obligation to decide cases with reasonably neutral principles.[137] An acknowledgement that the Constitution allows the Supreme Court to adjust the scope of its power to review federal statutes does not absolve the justices of their responsibilities to base their decisions on doctrines or principles that transcend the outcome in a particular case.

Finally, one can still rely on sub-constitutional norms to criticize or denounce a decision not to invoke the *Marbury* prerogative. A ruling that declines to nullify an unconstitutional federal statute may be imprudent, pernicious, or opportunistic—even if it complies with the external boundaries established by constitutional text. And textualist interpretive theories allow ample room for the evolution of sub-constitutional norms, such as tradition, norms of reciprocity, and stare decisis doctrines, that provide

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134. *See* Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 373 (1992) ("The need to persuade society to obey sets bounds on judicial creativity.").

135. *See* U.S. CONST. art. III.

136. *See* 28 U.S.C. § 453 (requiring federal judges to swear or affirm that they will administer justice "without respect to persons, and do equal right to the poor and to the rich").

137. *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

standards for judging the Supreme Court's use of its discretionary *Marbury* powers. The lack of constitutionally mandated rules should not be equated with an absence of *any* criteria for evaluating and critiquing Supreme Court rulings that reject constitutional challenges to federal statutes. The point is only that these criteria are external to the Constitution, and are directed to a judge's sense of prudence rather than his notions of legal obligation. Any textualist justice who invokes stare decisis to uphold an unconstitutional federal statute can do so with a clear constitutional conscience.

2. Invoking Precedent to Invalidate a Federal Statute

The previous subsection showed that the Supremacy Clause permits the justices to invoke stare decisis, but only when they *reject* constitutional challenges to federal statutes or treaties. It's a different story when the Supreme Court uses stare decisis to *sustain* a litigant's challenge to an act of Congress. In these cases, the justices invalidate a federal statute solely because it conflicts with a previously decided Supreme Court ruling—even if the statute comports with a proper textualist interpretation of the Constitution.

Consider the Court's rulings on state sovereign immunity. *Hans v. Louisiana*[138] held that the Constitution prohibits individuals from suing states in federal court unless the state consents to suit; this sovereign immunity attaches even when the plaintiff is a citizen of that state and sues under the federal-question jurisdiction. *Hans*'s analysis is controversial. Its holding finds no support in the Eleventh Amendment's text, which applies only when a state is sued by "[c]itizens of *another* State."[139] And the originalist evidence surrounding the framers' and ratifiers' support for state sovereign immunity is more varied and nuanced than the grounds that the Court invoked for its ruling.[140] Let us assume, again for the sake of argument, that *Hans* was wrongly decided, and consider whether a textualist could nevertheless invoke stare decisis and use *Hans* to invalidate an act of Congress.

In this situation, the Supremacy Clause will constrain a textualist justice's ability to use stare decisis. The Supremacy Clause recognizes federal statutes as "the supreme Law of the Land," so long as they are enacted "in Pursuance" of the Constitution. If Congress enacts legislation that complies with the Constitution's substantive provisions, then the Supremacy Clause leaves no room for a textualist to invalidate that statute on the ground that it conflicts with an earlier, wrongly decided Supreme Court precedent. The only way that a textualist could refuse to enforce an act of Congress is if it conflicts with another "supreme" law, such as a treaty or federal constitutional provision. In those types of cases—where two *supreme* laws conflict,

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138. 134 U.S. 1 (1890).

139. U.S. CONST. amend. XI (emphasis added); *see also* John F. Manning, *The Eleventh Amendment and Precise Constitutional Texts*, 113 YALE L.J. 1663, 1680–81 (2004).

140. Even *Hans*'s academic defenders acknowledge this point. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888–1986, at 7–9 (1990). For criticism of *Hans*, see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1476 (1987).

or where the justices must decide whether Congress or the Supreme Court should hold final interpretive authority over a constitutional issue—the written Constitution does not resolve which should prevail, so the justices do not violate Article VI, nor do textualist jurists violate their interpretive commitments, if they invoke stare decisis to uphold a federal statute over the Constitution's original meaning.

But textualists, by equating "[t]his Constitution" with the original meaning of its words, cannot regard Supreme Court precedents as "the supreme Law of the Land" unless those earlier decisions represent proper textualist interpretations of the Constitution. And although Article VI can be read to confer supremacy on the constitutional interpretations that the political branches memorialize in federal statutes or treaties, it does not give this status to the views that the Supreme Court expresses in its opinions.[141] The Supremacy Clause *requires* federal courts to enforce congressional legislation and treaties when they comply with the Constitution, properly interpreted. This is where Professor Lawson's Supremacy Clause arguments against stare decisis have real bite. Wrongly decided judicial precedents are (at best) nonsupreme rules of decision, and a textualist justice violates Article VI if he uses them to displace a "supreme" federal statute or treaty that otherwise complies with the Constitution.

The Supremacy Clause thus provides for an asymmetric regime of stare decisis. There are no plausible constitutional objections when the Supreme Court uses stare decisis as a shield, by invoking wrongly decided precedents to turn aside constitutional challenges to federal statutes or treaties. But the Supremacy Clause limits a textualist justice's authority to invoke stare decisis as a sword; he cannot decline to enforce an act of Congress or a treaty provision merely because it conflicts with a wrongly decided Supreme Court ruling. A textualist may still consult *Hans v. Louisiana* for its epistemic value in finding the right answer to a disputed constitutional question. But he cannot treat *Hans* as an authoritative rule of decision if *Hans* misinterpreted the Constitution—unless he surrenders to pragmatism and allows policy-driven consequentialist analysis to trump constitutional text and history. Stare decisis is incompatible with textualist interpretive methodologies when it allows a nonsupreme judicial precedent to prevail over federal statutes or treaties that comply with a proper interpretation of the Constitution.

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An entirely different framework applies to the relationship between stare decisis and constitutional challenges to *state* laws. State law falls outside the "supreme" laws that Article VI describes. And that makes all the difference for stare decisis analysis. Section II.B.3 considers whether the Constitution allows the Supreme Court to rely on wrongly decided precedents to *reject* federal constitutional challenges to state law. Section II.B.4 will explore

141. *See generally* Harrison, *supra* note 10.

whether the Constitution constrains the use of stare decisis in rulings that *sustain* challenges to state law.

3. Invoking Precedent to Uphold State Law

Plessy v. Ferguson[142] held that the Fourteenth Amendment allows states to mandate racial segregation on railroads. By the time of the Court's ruling in *Brown v. Board of Education*,[143] all nine justices had concluded that state-mandated segregation violated the Fourteenth Amendment. But the siren song of stare decisis figured prominently in the *Brown* litigation; John W. Davis's brief in the companion case of *Briggs v. Elliott* emphasized that southern states had ordered their institutions around the *Plessy* Court's blessing of racial segregation, and argued that these reliance interests counseled in favor of retaining *Plessy* even if the Court no longer viewed it as a proper interpretation of the Equal Protection Clause.[144] If we assume, for the sake of argument, that *Plessy* had indeed misconstrued the Fourteenth Amendment, the question to consider is whether the justices could have reaffirmed its separate-but-equal regime in the interests of maintaining stability or protecting reliance interests.

In these situations, the Supremacy Clause establishes a clear hierarchy for the Court to follow: the federal Constitution is a "supreme" law and state law is not. The justices cannot allow a nonsupreme state law to prevail over a federal constitutional command merely because an earlier-decided Supreme Court ruling had upheld similar laws against federal constitutional challenge. So they cannot invoke stare decisis when upholding a state law that would otherwise violate the proper interpretation of a federal constitutional provision. If a textualist justice concludes that separate-but-equal violates the Fourteenth Amendment's original meaning, he is not allowed to adhere to *Plessy* and invert Article VI's hierarchy of laws simply by invoking the policy concerns that underlie stare decisis doctrines.

Although the written Constitution leaves room for the Supreme Court to enforce unconstitutional *federal* statutes and treaties,[145] it does not leave the justices with any discretion when state laws contravene the Constitution. The Supremacy Clause not only compels state law to give way when it conflicts with the Constitution, it also specifically imposes a duty on judges to enforce this hierarchy.[146] And although the Constitution may permit the Supreme Court to respect federal statutes as final and conclusive resolutions of constitutional meaning, it is not plausible for the Court to give state legislation the final word on what "the Constitution" means. To begin, the Article

142. 163 U.S. 537 (1896).

143. 347 U.S. 483 (1954).

144. Brief for Appellees on Reargument at 59–60, *Briggs v. Elliott*, 347 U.S. 483 (1954).

145. *See supra* Section II.B.1.

146. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby* . . . .") (emphasis added).

VI requirement to subordinate state laws to the federal Constitution would become little more than an option if the courts could designate state lawmakers as final expositors of the Constitution's meaning. The Supremacy Clause also makes clear that state law is to be measured by a standard external to the views of state lawmakers. All of this indicates that the Constitution precludes courts from treating state lawmaking processes as the conclusive resolution of constitutional meaning.

The Supremacy Clause therefore *requires* the justices to subordinate state laws that conflict with "[t]his Constitution"; it leaves no room for them to uphold an unconstitutional state law merely because they want to preserve stability or reliance interests induced by previous Supreme Court rulings upholding similar laws against constitutional challenge. This compels textualists, who equate "[t]his Constitution" with the original meaning of its words, to enforce that Constitution whenever a litigant challenges a state law. Neither stare decisis considerations nor any other policy-driven consequentialist rationales can excuse a textualist jurist's decision to subordinate a federal constitutional provision to state law.

4. Invoking Precedent to Invalidate State Law

This is the last and most controversial of the four categories. The paradigm case here is *Lochner v. New York*,[147] a precedent that is widely disapproved and that also nullified a state law.[148] The question is whether the Constitution would constrain an early twentieth-century justice's ability to invoke stare decisis and invalidate a state law for conflicting with *Lochner*—on the assumption that *Lochner* misconstrued the Fourteenth Amendment's Due Process Clause.

Of course, a textualist justice cannot invoke a wrongly decided ruling such as *Lochner* to invalidate *federal* statutes.[149] But that is because Article VI ordains federal statutes as the "supreme Law of the Land" whenever they comport with the written Constitution. State laws do not share that lofty status under Article VI, even when they comply with the Constitution. They are laws, to be sure, but the Supremacy Clause does not specify their rank, nor does it secure any status for state law in federal-court litigation. It commands only that state law yield to the three categories of "supreme" law—the Constitution, the laws of the United States, and treaties. So does the Constitution *obligate* the Supreme Court to follow state law in the absence of conflict with one of the "supreme" laws? Or does it allow the justices to displace state law with some other source of nonsupreme law in those situations?

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147. 198 U.S. 45 (1905).

148. Not quite everyone deems *Lochner* wrongly decided. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 128–29 (1985); BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 113–25, 320–21 (1980). Those who approve of *Lochner* can substitute a case from their own lists of worst Supreme Court rulings invalidating a state law.

149. *See supra* Section II.B.2.

These questions go all the way back to *Calder v. Bull*,[150] where Justice Chase famously asserted that the Supreme Court need not apply or enforce state laws that conflict with "the general principles of law and reason."[151] He stated that when a law "takes property from A[] and gives it to B," or "makes a man a Judge in his own cause," the Supreme Court may resort to "general principles" rather than state law as the rule of decision.[152] Justice Chase was not attempting to concoct a federal constitutional prohibition on these types of laws; he nowhere invokes the Ninth Amendment or "substantive due process" or any other provision in the Constitution. His argument relies on what we now call "general law"—laws and principles that are not tied to a particular sovereign's command yet nevertheless can supply rules of decision for federal judges.

Is Justice Chase's approach compatible with the written Constitution? Certainly not for cases involving challenges to federal statutes. These laws are "supreme" so long as they comport with the Constitution. The "general principles of law and reason" are (at best) a nonsupreme source of rule of decision, so they cannot trump or in any way limit the scope of a constitutional federal statute. But it's a trickier question when it comes to state law. The Supreme Court's opinion in *Erie Railroad Co. v. Tompkins*[153] says that Justice Chase's approach is impermissible; *Erie* envisions only two possible rules of decision—"supreme" federal law and state law.[154] But *Erie*, like *Marbury*, is merely the Supreme Court's interpretive gloss on the Constitution, and one cannot judge the legality of stare decisis by assuming the correctness of a Supreme Court precedent. We must instead consider whether the text of the Constitution *compels* the Supreme Court to apply state law whenever it complies with the Constitution, federal statutes, and treaties.

The answer is no. Again, return to the language of Article VI. The Supremacy Clause establishes a two-tiered hierarchy, with the Constitution, treaties, and federal statutes "supreme" and all other laws nonsupreme. But Article VI does not establish or imply any rank among the nonsupreme sources of law, which include state law, foreign law, customary international law, general common law, natural law, and judicial precedents. All of these laws are jockeying for position below the supremacy line; the Supremacy Clause leaves open the issue of priority among these nonsupreme rules of decision. And although the Tenth Amendment reserves to the states powers "not delegated to the United States,"[155] the Constitution explicitly delegates to the federal judiciary the power to decide the "Cases" and "Controversies" listed in Article III. The case-deciding power necessarily includes a power to choose or create the rules of decision; that's how the federal courts resolve

150. 3 U.S. (3 Dall.) 386 (1798).

151. *Id.* at 388 (opinion of Chase, J.) (emphasis omitted).

152. *Id.* (emphasis omitted).

153. 304 U.S. 64 (1938).

154. *Id.* at 78 ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.").

155. U.S. CONST. amend. X.

admiralty cases,[156] and it's also how the Supreme Court resolves the interstate controversies that fall within its original jurisdiction.[157] The Supremacy Clause limits the Supreme Court's discretion in these choice-of-law matters, but it requires only that the justices prefer the three categories of "supreme" law over nonsupreme laws. It does not establish any status for state law in federal-court decisionmaking, and it is silent on the hierarchy between state law and general law created by judges.[158]

But then there is the Supreme Court's analysis in *Erie*, which claims that the Constitution prohibits federal courts from applying anything other than state law as rules of decision—unless the state law conflicts with the Constitution, a federal statute, or a treaty provision.[159] The *Erie* Court issued this pronouncement even though the parties to the case never argued it, and its opinion exhibits the characteristics of court rulings that reach out to decide issues without the benefit of adversarial briefing.[160] Like *Marbury*, the *Erie* opinion begs the crucial question in the case; it assumes that state law should outrank all the other sources of nonsupreme law when the text of the Constitution nowhere compels such a regime. *Erie* also neglects to discuss or even mention the many categories of nonsupreme and nonstate-law rules of decision that federal courts have long applied, besides the general commercial law that originated in *Swift v. Tyson*.[161] One of these was customary international law, or the law of nations. *Erie* omits any discussion of how customary international law might fit into its framework, leaving everyone at sea as to its post-*Erie* status. It is hard to squeeze customary international law into the supreme "laws of the United States" when it has not been

156. *See, e.g.*, Levinson v. Deupree, 345 U.S. 648, 651–52 (1953).

157. *See, e.g.*, Connecticut v. Massachusetts, 282 U.S. 660, 670–71 (1931); WRIGHT & KANE, *supra* note 16, at 413–14.

158. Professor Clark argues that the Supremacy Clause allows *only* the "Constitution," the "Laws of the United States," and "Treaties" to displace state laws. *See* Bradford R. Clark, Erie*'s Constitutional Source*, 95 CALIF. L. REV. 1289, 1289–90 (2007). That is not, however, what the Supremacy Clause says. It designates three categories of "supreme" federal law, and it commands state law to yield to those laws. This does not preserve any status for state law vis-à-vis the other sources of nonsupreme law. Of course, the Constitution still *permits* the justices to elevate state law above all other sources of nonsupreme laws, and Professor Clark's approach has great appeal to those who value federalism and distrust judicial discretion. But this is a prudential issue of policy, not a constitutional command. Other policy concerns, such as the need to promote stability and reliance interests, might be invoked to justify a different approach in other cases.

159. *See supra* note 154 and accompanying text.

160. *See* 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4505, at 50–54 (2d ed. 1996) (criticizing *Erie*'s constitutional analysis as "remarkably abbreviated" and "puzzling"). Other commentators have criticized the *Erie* opinion's tendentious analysis of the legislative history of the Rules of Decision Act. *See, e.g.*, Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 903–04 (1986); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1514–15 (1984); Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 388–89 (1964).

161. 41 U.S. (16 Pet.) 1 (1842).

codified in a federal statute or treaty.[162] But neither does it seem tenable to characterize it as state common law; this would disable federal courts from construing the law of nations and bind them to the interpretations of state institutions.[163] The most plausible view is that customary international law retains its pre-*Erie* status as general law,[164] a court-discovered rule of decision that is neither "supreme" federal law nor state law. This approach preserves the federal courts' ability to apply international-law doctrines such as consular immunity and head-of-state immunity, without compelling the courts to subordinate state law to international-human-rights norms on issues such as capital punishment or prison conditions.[165]

The Supreme Court's erroneous constitutional precedents represent another category of nonsupreme and nonstate-law rules of decision that post-*Erie* courts continue to apply. Of course, when a Supreme Court opinion correctly interprets the Constitution, its status is no different from the Constitution itself: it must displace state laws to the contrary and courts may (but need not) use it to trump federal statutes and treaties. But when a judicial precedent misconstrues the Constitution, one cannot equate that ruling with "[t]his Constitution" or "the laws of the United States"—at least not without rejecting the textualists' core premise that the judiciary derives its power from the formal ratification of constitutional language and is bound to the understandings that prevailed at the time of enactment. When the justices apply their mistaken precedents under the auspices of stare decisis, they are applying rules of decision that are neither "supreme" federal law nor "state" law. These precedents have the same legal status as the "general law" that the federal courts applied prior to *Erie*—yet the Supreme Court continues to apply today.

None of this means that the *Erie* Court erred when it decided to abolish a subset of general common law, namely, the general commercial law that

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162. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 819 & n.20 (1997) (noting that Article VI designates "treaties" as the supreme law of the land but omits any reference to customary international law).

163. *See, e.g.*, Philip C. Jessup, *The Doctrine of* Erie Railroad v. Tompkins *Applied to International Law*, 33 AM. J. INT'L L. 740, 743 (1939) ("It would be as unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law."); Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365, 461 (2002) (noting that divergent state interpretations of the doctrines of consular immunity and head-of-state immunity would "obviously have the potential to complicate American foreign relations and undermine the ability of the federal Executive to conduct foreign policy").

164. *See* The Paquete Habana, 175 U.S. 677, 700 (1900) (holding that customary international law is "part of our law," which federal courts should apply as a rule of decision "where there is no treaty, and no controlling executive or legislative act or judicial decision" on point).

165. The latter result logically follows from the widely held "modern" (and post-*Erie*) position that equates customary international law with "supreme" federal law. *See* Bradley & Goldsmith, *supra* note 162, at 818.

Swift v. Tyson had spawned.[166] That the written Constitution *allows* courts to apply nonsupreme rules of decision over state law in no way implies that they must or should, and the *Swift v. Tyson* regime had engendered practical problems by producing incentives for vertical forum shopping and inequitable treatment of similarly situated litigants.[167] But *Erie*'s decision to shrink the domain of general common law has three implications for the constitutionality of stare decisis. First, *Erie* (like *Marbury*) reflects a judicial policy choice rather than a constitutional command. The Constitution permits the Supreme Court to give state law priority over other sources of nonsupreme law, but it does not require this. *Erie* has become so ingrained that few can even conceive that the Constitution's text might leave room for courts to apply nonsupreme, nonstate law as rules of decision—but it does.

Second, *Erie* (again, like *Marbury*) has a settled core and a disputed periphery. *Erie*'s core prohibits federal courts from using the judge-created commercial-law doctrines from *Swift v. Tyson* to displace state law in diversity litigation. Yet today many take *Erie* to establish a more categorical principle that state law must *always* prevail over all other nonsupreme rules of decision, including customary international law[168] and wrongly decided constitutional precedents.[169] But one need not endorse that overly broad proposition to preserve the Court's judgment in *Erie*, which rested as much on the unworkability of the *Swift v. Tyson* regime as it did on the Court's cursory discussion of the constitutional issues,[170] and which never considered or discussed the implications of its holding for customary international law, admiralty or interstate law, or constitutional stare decisis.

Finally, and most importantly, the *Erie* opinion (like *Marbury*) is nothing more than the Supreme Court's interpretive gloss on ambiguous constitutional provisions. As far as textualism is concerned, the justices remain free to adopt stare decisis practices that undermine or conflict with the *Erie* opinion, just as they can use stare decisis policies that deviate from Chief Justice Marshall's opinion in *Marbury*. The justices must obey the *external* legal constraints imposed by those who ratified the Constitution's language; they are not similarly obligated to follow the self-imposed constraints derived from their earlier rulings.

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166. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 73–78 (1938).

167. *See id.* at 74–75. Under the *Swift v. Tyson* regime, litigants sued in state court were judged by state common law, while those sued in federal diversity courts were subject to the federal general common law. This gave noncitizens significant forum-shopping advantages over in-state litigants, because 28 U.S.C. § 1444(b) blocks in-state defendants from removing diversity cases to federal court.

168. *See, e.g.*, Bradley & Goldsmith, *supra* note 162, at 852–53 (arguing that "*all* law applied by federal courts must be either federal law or state law" and that a "federal court can no longer apply [customary international law] in the absence of some domestic authorization to do so").

169. *See generally* Lawson, The *Constitutional Case*, *supra* note 11 (assuming that the Constitution obligates the Supreme Court to enforce state laws if they comport with the Constitution and "supreme" federal law).

170. *See Erie*, 304 U.S. at 73–78.

Now suppose that a textualist Supreme Court justice must decide whether to follow or overrule *Lochner* in a case presenting a constitutional challenge to a state law. Stare decisis enables him to assume *Lochner*'s correctness, even if it misconstrued the Constitution, and use it as a rule of decision in constitutional litigation. But here is how the Constitution authorizes this maneuver: *Lochner* is either a correct interpretation of the Constitution, in which case the Supreme Court *must* apply it, or the *Lochner* opinion is general common law—a court-created rule of decision that lacks any nexus to the Constitution, federal statutes, or treaties. In the latter situation, the Supreme Court must choose between applying state law and apply-applying *Lochner*-as-general-common-law. But each of these sources of law is nonsupreme, and Article VI imposes no requirement that the justices choose state law over judicial precedent (or vice versa). A justice who prizes federalism and dislikes judicial policymaking will likely prefer state law in these situations, while a justice who is more concerned with promoting stability, reliance interests, and the other policies of stare decisis will opt for the earlier-decided ruling. Either choice, however, is constitutionally permissible—the latter disposition creates tension only with the *Erie* opinion and not with the written Constitution. When the Supreme Court invokes stare decisis and uses a constitutional precedent to displace a state law, it is saying that it need not decide whether the precedent belongs in the "federal constitutional law" or "general common law" cubbyhole; under either, the challenged state law gives way. The former because the Supremacy Clause commands it, the latter because the Supremacy Clause does not forbid it. The written Constitution does not compel the federal judiciary to apply state law, and it permits the justices to subordinate state law to judge-made common-law doctrines, including the Supreme Court's erroneous constitutional precedents.

This conclusion is not as staggering as it may seem.

First, the Supreme Court has been doing this from the get-go, from *M'Culloch v. Maryland*[171] all the way through modern substantive-due-process jurisprudence. The examples of Supreme Court rulings that subordinate state law to judge-created doctrines, in the absence of conflict between state law and constitutional text, are legion—from Justice Chase's seriatim opinion in *Calder v. Bull*,[172] to the Dormant Commerce Clause jurisprudence,[173] to *Swift v. Tyson*,[174] to *Lochner*-era substantive due process,[175] to the decisions subordinating state law to "executive agree-

171. *See* 17 U.S. (4 Wheat.) 316 (1819) (invalidating a state tax on the operations of the Bank of the United States, even though no provision in the Constitution or in any federal statute explicitly precluded states from taxing the bank).

172. *See* 3 U.S. (3 Dall.) 386, 386–95 (1798) (opinion of Chase, J.).

173. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

174. *See* 41 U.S. (16 Pet.) 1 (1842).

175. *See* Lochner v. New York, 198 U.S. 45 (1905).

ments,"[176] to the Warren Court's decisions establishing voting as a "fundamental" right,[177] to the doctrine of "dormant foreign affairs preemption."[178] None of the state laws in these cases contradicted any language in the Constitution, federal statutes, or treaties—yet the justices allowed judge-made common-law doctrines rather than state law to supply the rule of decision. True, most of these rulings purported to reflect constitutional decrees, but the Court's efforts to derive these decisions from the text of the Constitution range from feeble to farcical. The justices in these rulings are instead exercising their constitutional prerogative to substitute court-created rules of decision for state law. Whether one calls this "general law,"[179] "natural law,"[180] "inferences from structure,"[181] "customary international law,"[182] "dormant preemption,"[183] "substantive due process,"[184] "constitutional common law,"[185] or "a brooding omnipresence in the sky,"[186] they all amount to the same thing: a prerogative to apply judge-made (or judge-discovered) doctrines—rather than state law—as rules of decision in cases where the state law nowhere conflicts with any provision of the "supreme" federal laws delineated in Article VI.

Second, that the Constitution *permits* the justices to subordinate state law to judge-created doctrines does not imply that they *should* or even *will* do this. Nothing prevents the justices from forswearing this prerogative, in part or in whole, for prudential reasons. The *Erie* ruling, for example, serves as a precommitment device preventing the federal courts from resurrecting the general commercial law that flourished in the nineteenth century. Some formalists might want to go further, and adopt a regime that categorically prohibits federal courts from displacing state-law with nonsupreme, judge-created doctrines. And this notion of a *per se* prohibition on judge-created

176. *See* United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

177. *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966); Carrington v. Rash, 380 U.S. 89 (1965); Reynolds v. Sims, 377 U.S. 533 (1964).

178. *See, e.g.*, Zschernig v. Miller, 389 U.S. 429, 432 (1968) (invalidating an Oregon probate statute solely because the Court deemed it "an intrusion by the State into the field of foreign affairs," which the Court thought should be "entrust[ed] to the President and the Congress" (citation omitted)); Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 420 (2003) (holding that federal courts may invalidate state legislation that "will produce something more than incidental effect in conflict with express foreign policy of the National Government").

179. *See generally Swift*, 41 U.S. (16 Pet.) at 1.

180. *See* Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 709 (1975).

181. *See generally* CHARLES L. BLACK, JR., *Inference from Structure: The Neglected Method*, *in* STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 3 (1969).

182. *See* The Paquete Habana, 175 U.S. 677 (1900).

183. *See generally Zschernig*, 389 U.S. 429.

184. *See* Lochner v. New York, 198 U.S. 45 (1905).

185. *See* Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

186. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

general common law is certainly defensible: it preserves values of federalism and representative democracy, and it removes opportunities and temptations for federal judges to denigrate state law merely because it conflicts with their personal beliefs. The justices will also have strong incentives to disclaim at least some of their general-law powers given the veil of ignorance that shrouds the future makeup of the Supreme Court. (Could anyone have foreseen in 1968, at the high-water mark of the Warren Court, that Republican presidents would make eleven consecutive Supreme Court appointments?) If the conservative majority on the Roberts Court used the rubric of "general law" as a license to subordinate progressive state laws willy-nilly, it would embolden successor courts to engage in a similar ad hoc disregard of state laws that conservatives favor. The inability to foresee the outcomes of future elections, or the timing of Supreme Court retirements, creates a world of mutually assured destruction that will dissuade even the most rabidly partisan jurists from using general law as an excuse simply to impose their will on the states. But a strategy of total forbearance when it comes to general common law is not a regime that the constitutional text or original understandings compel,[187] and textualist and originalist jurists can carve out narrow exceptions for stare decisis (though only in cases that invalidate *state* laws) without betraying their interpretive commitments.

Third, recognizing the Supreme Court's post-*Erie* general-common-law powers offers a means for textualists and originalists to make peace with *Brown v. Board of Education*[188] and other canonical Supreme Court rulings that are otherwise impossible to reconcile with their methods of constitutional interpretation. The Equal Protection Clause, as originally understood, did not prohibit segregated public schools,[189] so textualists face a cruel trilemma: they can embrace strained historical arguments for *Brown*,[190] create a living-constitutionalism exception for *Brown*,[191] or admit that *Brown* was wrong.[192] None of these options is appealing; whatever one chooses, one will be deemed naïve, unprincipled, or "outside the mainstream." Acknowledging a limited role for general common law deftly avoids this trilemma.

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187. It is also important to avoid the "perfect Constitution" fallacy, which assumes that the Constitution must prohibit undesirable conduct while overlooking other mechanisms that can prevent the abuses. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 428 (1993) (Scalia, J., concurring) (rejecting "actual innocence" as a judicially enforceable constitutional claim because "it is improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon").

188. 347 U.S. 483 (1954).

189. *See* Michael J. Klarman, Brown, *Originalism, and Constitutional Theory*, 81 VA. L. REV. 1881, 1893 (1995); Strauss, *supra* note 42, at 304–06.

190. *See* Michael W. McConnell, *The Originalist Case for* Brown v. Board of Education, 19 HARV. J.L. & PUB. POL'Y 457 (1996).

191. This could be done either by arguing that the meaning of the Equal Protection Clause changed, or else by arguing that the Equal Protection Clause implicitly delegated power to future Supreme Courts to impose new visions of equality on the states. *See* BORK, *supra* note 46, at 82–83.

192. *E.g.*, VERMEULE, *supra* note 23, at 280.

On this view, *Brown* is correct (or, at the very least, it is not wrong) for two reasons. First, nothing in the written Constitution compels the Supreme Court to apply state law over judge-created or judge-discovered doctrines. Second, if ever a court could justify a decision to subordinate state law to court-created doctrines, it is in cases like *Brown*, where segregationist state laws had been produced by regimes that denied blacks the right to vote in violation of the Fifteenth Amendment, depriving those state policies of any democratic pedigree or constitutional legitimacy. Just as *Swift v. Tyson* created a general common law to promote business relations, *Brown* and later cases can be viewed as establishing a general common law of racial equality. Characterizing *Brown* in this manner may create some tension with *Erie*, but other efforts to defend the outcome in *Brown* create tension with the original meaning of the Equal Protection Clause. For textualists and originalists who want to preserve the outcome in *Brown*, this should not be a difficult choice.

General common law also solves another nagging legitimacy problem with the Supreme Court's race jurisprudence, which arises from the fact that the Court waited nearly 100 years after ratification of the Fourteenth Amendment before invalidating public-school segregation in the states. If the ruling in *Brown* rests solely on the Equal Protection Clause, that means either that: (a) the Supreme Court violated the Constitution by tolerating racial segregation for the fifty-eight years between *Plessy* and *Brown*; (b) the Supreme Court can change the meaning of the Equal Protection Clause without using Article V; or (c) the Equal Protection Clause authorizes the Supreme Court to impose different visions of racial equality, depending on what it sees fit at any given time. The difficulties in justifying the Court's transition from *Plessy* to *Brown* dissolve as soon as one roots *Brown* in the Supreme Court's general-law powers, because general common law (unlike the Constitution) can be changed by judges. Consider also the Supreme Court's delayed actions against state anti-miscegenation laws. If the Equal Protection Clause truly prohibits states from banning interracial marriage, then the Court's decision in *Naim v. Naim*[193] to dismiss the constitutional challenge to state anti-miscegenation laws by concocting a jurisdictional defect was not only cowardly but lawless.[194] Article VI does not permit the justices to subordinate a constitutional mandate to state law so that the justices can preserve their political capital or their self-serving reputational concerns. Reconceiving the Court's racial-equality jurisprudence as general common law legitimizes all of these maneuvers, and at only a small cost—at the cost of disabling the justices from entrenching these rulings against override by an act of Congress or a treaty. Any jurist who secretly doubts whether *Brown* properly interpreted the Equal Protection Clause can confidently apply *Brown* and related cases on stare decisis grounds (at least when it comes to state law) without violating any obligations that he might have to

193. 350 U.S. 985 (1956).

194. *See* SUNSTEIN, *supra* note 21, at 140–64 (discussing *Naim*).

the original meaning of constitutional language.[195] The same goes for other ahistorical precedents that nullify state law yet would be unthinkable for even the most dogmatic originalists to overrule; these include *Loving v. Virginia*,[196] *Reynolds v. Sims*,[197] *Griswold v. Connecticut*,[198] *Gideon v. Wainwright*,[199] modern sex-equality jurisprudence,[200] and modern free-speech jurisprudence.[201] The only caveat is that a textualist or originalist jurist cannot use these precedents to invalidate an act of Congress or a treaty.

Finally, recognizing that the Constitution permits the Supreme Court to substitute principles of general common law for state law does not license the justices to displace state law at whim, nor does it give them a roving Madisonian veto over state legislation. Veil-of-ignorance mechanisms will induce the justices to rely on neutral principles rather than raw partisanship.[202] And Article III, by vesting federal courts with "the judicial power," implies a responsibility to develop rules of decision for resolving cases in a principled and incremental manner, resembling the common-law processes that produced the Court's admiralty doctrines and the law governing interstate disputes.[203] Some may notice affinities between this vision of general law and the theories of common-law constitutional interpretation propounded by Professor Strauss and other commentators.[204] But there are crucial differences between recognizing atextual or nonoriginalist constitutional precedents as general law and equating them with federal constitutional law, as the adherents of common-law constitutional interpretation do.

First, this judge-created common law can never be used to invalidate an act of Congress or a treaty provision, and the rulings are defeasible by congressional legislation and treaties. Article VI compels this hierarchy: federal statutes and treaties are "supreme" law, while general common law is nonsupreme. Common-law constitutionalism, for example, might allow the

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195. *Bolling v. Sharpe*, 347 U.S. 497 (1954), is in a different category, because general common law cannot trump an act of Congress. *See infra* notes 246–247 and accompanying text.

196. 388 U.S. 1 (1967) (invalidating state anti-miscegenation laws).

197. 377 U.S. 533 (1964) (invalidating malapportioned districts in state legislatures).

198. 381 U.S. 479 (1965) (invalidating a state law restricting use of contraceptives by married couples).

199. 372 U.S. 335 (1963) (expanding the right to appointed counsel in state criminal proceedings).

200. *E.g.*, Taylor v. Louisiana, 419 U.S. 522 (1975) (invalidating a state law excluding women from jury service).

201. *E.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (invalidating a state law restricting flag burning).

202. *See supra* note 187 and accompanying text.

203. *See supra* notes 135–136 and accompanying text.

204. *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996); Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509 (1996); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994).

Supreme Court to use *Loving v. Virginia* to invalidate the federal Defense of Marriage Act ("DOMA") or the state laws that DOMA explicitly protects. General common law, by contrast, could never be used in this manner. This goes a long way toward alleviating the countermajoritarian difficulties that afflict the theories of common-law constitutionalism;[205] with general common law, the Court's adventurism is directly constrained by the statutes and treaties enacted by the national political processes. (These constraints include the Rules of Decision Act, which, depending on how broadly one construes it, may foreclose the Court from deploying wrongly decided constitutional precedents over state law in some of the "civil actions" that it decides.[206])

Second, these general-law doctrines are not part of the Constitution or any other "supreme" federal law. That means that Article VI imposes no obligation on state judges to obey or follow the Supreme Court's general-law pronouncements, even though the general-law rubric allows the Supreme Court to reaffirm an erroneous constitutional precedent and use it to displace state law. The Supreme Court's ruling, however, remains binding on state courts in the realist, Holmesian bad-man sense: a state court that defies the Supreme Court will likely face a swift reversal, and this threat of reversal may suffice to keep state judges in line. State-court nonacquiescence will likely prove futile, even if constitutionally permissible. It also means that general law cannot by itself supply a basis for "arising under" jurisdiction in federal court; a litigant must be able to characterize his grievances as nonfrivolous federal constitutional claims. They need not be winning constitutional arguments, but they must be colorable enough to get through the federal courthouse door; once there, supplemental jurisdiction enables him to rely on the Supreme Court's general-law precedents.[207]

Third, general common law cannot supply a remedy in federal habeas corpus proceedings, as 28 U.S.C. § 2254(a) allows habeas relief for state prisoners only when their custody "violat[es] the Constitution or laws or treaties of the United States."[208] But there is nothing anomalous about a regime that carves out the Supreme Court's erroneous constitutional pronouncements from enforcement in post-conviction proceedings, while

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205. *See generally* ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON 92 (2009) (noting that under the theories of common-law constitutionalism, it is "not at all obvious why judges should rely on precedent or tradition to trump the views of current legislatures").

206. *See infra* notes 216–229 and accompanying text.

207. *See* 28 U.S.C. § 1367 (2006) (extending the federal courts' supplemental jurisdiction to the maximum extent authorized by Article III); United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (holding that Article III extends the federal courts' supplemental jurisdiction to all claims involving the same "common nucleus of operative fact"); *see also* 28 U.S.C. § 1257 (2006) (authorizing the Supreme Court to review an entire state-court "judgment[] or decree[]" whenever a litigant presents a federal-law claim); Jonathan F. Mitchell, *Reconsidering* Murdock: *State-Law Reversals as Constitutional Avoidance*, 77 U. CHI. L. REV. 1335, 1342–45 (2010) (noting that the text of 28 U.S.C. § 1257 permits the Supreme Court to review all issues decided in a final state supreme court ruling so long as the "judgment[] or decree[]" presents at least one federal-law claim).

208. 28 U.S.C. § 2254(a) (2006).

allowing the Court to use them when reversing state-court convictions on direct review. *Stone v. Powell*[209] already precludes the Supreme Court from granting habeas relief on exclusionary-rule claims, even as the Court continues to enforce the exclusionary rule on direct appeal, and textualist jurists can simply extend the rule in *Stone* to other wrongly decided constitutional precedents.[210] In contrast to the federal habeas statute, 42 U.S.C. § 1983 is more easily construed to support a cause of action for those asserting rights secured by general-law doctrines, as it applies to persons deprived of "rights, privileges or immunities secured by the Constitution and laws." Even if one interprets the ambiguous word "laws" in § 1983 to extend only to "supreme" federal laws,[211] general common law can itself supply a cause of action to vindicate rights that the Supreme Court has established[212]—so long as no provision of "supreme" federal law precludes it.

Fourth, common-law constitutionalists hold that the Supreme Court not only may but *should* embrace judicial precedent over state law, and they invoke Edmund Burke to construct theories of legitimacy and epistemology to justify this practice.[213] This account of stare decisis, by contrast, remains agnostic on the normative question of when the Supreme Court should follow wrongly decided constitutional precedents over state law; the answer could very well be "never."[214] The point is only that the text of the Supremacy Clause gives the Supreme Court room to decide whether to apply (nonsupreme) judicial precedent over (nonsupreme) state law as a rule of decision, and a textualist can embrace a role for stare decisis in these types of cases while still insisting that the Supreme Court follow the original meaning of constitutional text whenever it purports to construe the document.

By equating the Supreme Court's wrongly decided precedents with general common law, rather than federal constitutional law, this account of stare

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209. 428 U.S. 465 (1976) (requiring federal habeas courts to reject exclusionary-rule claims so long as the state courts provided an "opportunity for full and fair litigation" of the claim, even if the state courts decided the claim incorrectly).

210. *See, e.g.*, Withrow v. Williams, 507 U.S. 680, 700 (O'Connor, J., dissenting) (arguing that *Stone* should be extended to "bar claims on habeas that allege[] violations of the prophylactic rule of *Miranda v. Arizona*"); *see also* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) (arguing that the rule in *Stone* should apply to all constitutional claims brought by convicted state prisoners).

211. *See, e.g.*, Lewellen v. Metro. Gov't, 34 F.3d 345, 347 (6th Cir. 1994) ("Unless a deprivation of some federal constitutional or statutory right has occurred, § 1983 provides no redress even if the plaintiff's common law rights have been violated and even if the remedies available under state law are inadequate.").

212. *See* Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 412 (1982) (noting that early twentieth-century federal courts freely created private rights of actions by "exercising the common law powers recognized in *Swift v. Tyson*," and that federal courts continued this practice post-*Erie*).

213. *See* Strauss, *supra* note 204, at 893–94; Merrill, *supra* note 204, at 515–23; Young, *supra* note 204, at 686–715.

214. *See supra* note 187 and accompanying text.

decisis poses a less serious threat to representative government than common-law constitutionalism, or the more robust versions of living constitutionalism that encourage the justices to interpret the Constitution in a manner that advances contested normative values. It is difficult to believe that the Constitution gives unelected judges *those* types of powers when Article V does so much to prevent the enactment of new constitutional rules that lack supermajoritarian support. But general common law can never be used to change the Constitution's meaning, or trump an act of Congress or a treaty. It simply substitutes judicial precedents for state law as the rules of decisions in a limited subset of cases.[215]

C. *A Note on the Rules of Decision Act*

Even though the text of the Supremacy Clause allows the Supreme Court to apply judicial precedent rather than state law as rules of decision, the Court must still comply with the Rules of Decision Act ("RDA"), which provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[216] Earlier versions limited this command to "trials at common law," but since 1948 the statute has extended to "civil actions," which include suits seeking equitable relief but exclude criminal prosecutions.

The broadest possible construction of the RDA would compel the Supreme Court to apply state law over judicial precedent in every civil proceeding not governed by one of the "supreme" federal laws—the federal Constitution, an act of Congress, or a treaty.[217] Even on this view, the Supreme Court could still apply its questionable constitutional precedents as general common law when reviewing federal and state criminal prosecutions, but it would leave them powerless to apply those precedents over state law in civil proceedings. This construction would also eradicate almost all forms of federal common law in federal civil cases, except where an act of Congress or constitutional provision delegates those common-law powers to

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215. Professor Harrison has argued that the Supreme Court's norms of stare decisis (rather than the precedents themselves) qualify as general common law, and suggests that Congress may therefore legislate rules of constitutional stare decisis that differ from those deployed by the Supreme Court. *See* John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503, 531–43 (2001). But Congress cannot legislate a regime of stare decisis that inverts the hierarchy of laws established in Article VI. A statute commanding the Supreme Court to give binding precedential weight to *Plessy* or *Seminole Tribe* (or any other precedent that nullifies a federal statute or upholds a state law against constitutional challenge) will violate the Supremacy Clause if those precedents represent erroneous constitutional pronouncements. Once the Court's stare decisis practices are derived from the text of the Supremacy Clause, Congress has only a limited power to legislate the priority that should be given to wrongly decided constitutional precedents.

216. 28 U.S.C. § 1652 (2006).

217. *See, e.g.*, Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 799 (1989).

the courts.[218] State law, rather than judge-created doctrines, would be used to fill any other gaps in the "supreme" federal law; federal courts could create common law in civil cases only when the "supreme" federal law *and* state law are incapable of providing an answer.

It is not clear that this approach represents the proper textualist interpretation of the RDA. Some commentators, for example, insist that the phrase "laws of the several states" refers not to the laws of *individual* states, but rather to a nationwide common law that transcends state borders.[219] But even if we bracket this issue and assume that the RDA's mandate extends to an individual state's laws, the requirement to apply the "laws of the several states" is triggered only "in *cases where* they apply." This language seems to envision categories of cases in which state law "applies," and others in which it does not.[220] Admiralty and interstate cases, for example, qualify as "civil actions," yet the Supreme Court has long relied on its own common-law precedents, at the expense of state law, in resolving those cases—even though no federal statute, treaty, or constitutional provision conflicts with state law in those situations.[221] One might defend this practice by characterizing admiralty and interstate cases as the types of "cases" in which state law does not "apply"; instead, they are cases more appropriately resolved by a uniform court-created common law rather than the varying laws of the several states. This approach treats the RDA's "in cases where they apply" caveat as delegating to the Supreme Court the power to decide whether state law or court-created common law should "apply" as the rule of decision in any particular "case."[222]

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218. *See id.* at 790–94.

219. *See, e.g.*, WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789, at 86 (1990) ("In the Judiciary Act the words 'respective' or 'respectively' are used to individualize or particularize the reference, whereas 'several' is used to refer to a collection of individuals or entities as a group."); *id.* at 140 ("The phrase, 'the laws of the several states,' in [the RDA] does not mean that the national courts are to apply the law of a particular state . . . . If this meaning had been intended, the word used almost certainly would have been 'respective' and not 'several.' "); Suzanna Sherry, *Wrong, Out of Step, and Pernicious:* Erie *as the Worst Decision of All Time*, 39 PEPP. L. REV. (forthcoming 2012) ("[T]he instruction in [the RDA] to apply 'the laws of the several states' directed courts not to the law of any individual state, but rather to the law of all states—in other words, to federally developed common law. The purpose was to ensure that *American* law, not *British* law, would apply in the federal courts.").

220. Field, *supra* note 160; *see also* Cent. Pines Land Co. v. United States, 274 F.3d 881, 887 (5th Cir. 2001) ("After all the Rules of Decision Act itself ends with the qualifying phrase 'in cases where [state laws] apply.' " (footnote omitted)).

221. *See, e.g.*, David P. Currie, *Federalism and the Admiralty: "The Devil's Own Mess"*, 1960 SUP. CT. REV. 158; Field, *supra* note 160; *supra* notes 156–157 and accompanying text.

222. *See* Campbell v. City of Haverhill, 155 U.S. 610, 615 (1895) ("Perhaps under the final words of [the RDA], 'in cases where they apply,' the court may have a certain discretion with respect to the enforcement of state statutes such as was exercised by this court in several cases."); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1168 n.194 (1986) ("The ambiguous phrase 'in cases where they apply' surely can be read to mean 'in cases in which there is no federal common law preempting state rules of deci-

Neither of these approaches provides a completely satisfying interpretation of the RDA. The first seems to leave the "in cases where they apply" caveat with no work to do, while the second treats the statute as a tautology, a statutory directive to the federal courts to apply state law except in cases where they choose to apply court-created common law instead. A third possible approach would interpret the RDA's "in cases where they apply" caveat as preserving the common-law powers of federal courts that were understood and accepted in 1948. When Congress re-enacted the RDA in 1948, the Supreme Court had long been applying judicial precedents over state law in interstate controversies[223] and admiralty cases,[224] and by invoking stare decisis in cases presenting constitutional challenges to state laws.[225] By extending the RDA from "trials at common law" to "civil actions," the re-enacted RDA ratified the Supreme Court's 1945 decision in *Guarantee Trust Co. v. York*,[226] which extended *Erie*'s holding to equity cases.[227] But by preserving the Act's limitation to "cases where [state laws] apply," the statute left undisturbed the settled common-law powers that the Supreme Court had asserted prior to 1948. On this view, the prerogative to apply court-created common law over state law depends less on the Supreme Court's whim and more on the historical practices that pre-date the RDA's 1948 re-enactment.

I do not attempt to offer a definitive construction of the RDA in this Article, an issue that commentators have debated for decades without resolution.[228] But it is important to note, first, that the RDA is a "supreme" law that the federal courts must obey. Second, the text of the RDA can be construed to give courts latitude in deciding when state law "applies" and when other bodies of law (such as general commercial law, customary international law, or Supreme Court precedent) should supply the rule of decision, especially if those practices were established when Congress re-enacted the RDA in 1948.[229] Third, even the broadest possible construction

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sion.' "); *see also* Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 816 (1989).

223. *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).

224. *See* S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917).

225. *See, e.g.*, Sipuel v. Bd. of Regents, 332 U.S. 631 (1948) (invalidating the University of Oklahoma Law School's racially exclusionary policies by relying exclusively on the precedential force of *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938)).

226. 326 U.S. 99 (1945).

227. *See* Revisor's Note at 28 U.S.C. § 1652 (2006) (noting that " 'Civil actions' was substituted for 'trials at common law' to clarify the meaning of the Rules of Decision Act in the light of the Federal Rules of Civil Procedure. Such Act has been held to apply to suits in equity").

228. *See* WRIGHT & KANE, *supra* note 16, at 370 ("No issue in the whole field of federal jurisprudence has been more difficult than determining the meaning of this statute.").

229. Early court rulings interpreting the original Rules of Decision Act, which are relevant only to the extent that they might provide evidence of the statute's meaning at the time of enactment, construed the RDA to require the application of state law only in areas that they deemed governed by "local" law, such as title to real property. These diversity courts retained their prerogative to apply "general" law—such as the law merchant and the law of nations—in

of the RDA will not foreclose the Supreme Court from applying a wrongly decided constitutional precedent when reviewing federal and state criminal prosecutions, so long as it does not conflict with a "supreme" federal statute or treaty provision.

* * *

Supreme Court justices must comply with the external legal constraints in the ratified constitutional language, but they need not follow the self-imposed constraints from their previous opinions. From this simple observation comes a theory of stare decisis that allows textualists to accommodate constitutional precedents while remaining true to their textualist interpretive commitments. On this view, the Supreme Court must always obey the two-tiered hierarchy of laws established in Article VI: the Constitution, federal statutes, and treaties are "supreme"; state laws and judicial precedents are nonsupreme. But there is no obligation to follow *Marbury*'s suggestion that federal courts may never enforce an unconstitutional federal statute, or *Erie*'s suggestion that state law must always prevail over other sources of nonsupreme law, such as judicial precedent. As canonical as those decisions are, they are merely Supreme Court opinions and not part of the written Constitution. And this fact enables textualists to invoke stare decisis when upholding federal statutes against constitutional challenge or when sustaining "constitutional" challenges to state laws—even if the relevant precedent misconstrues the Constitution. It may seem paradoxical that this defense of stare decisis scales back on two of the most famous precedents in Supreme Court's history, but there is nothing objectionable about that from a textualist standpoint.

The following chart illustrates this approach:

	Invoking Constitutional Stare Decisis to:	
	Uphold	**Nullify**
Act of Congress or Treaty	**Permissible** under Art VI: expands congressional supremacy, shrinks domain of *Marbury*	**Violates** Art. VI: if it causes an erroneous precedent to trump a federal statute or treaty
State Law	**Violates** Art. VI: if an erroneous precedent causes state law to trump Constitution	**Permissible** under Art. VI: expands general common law, shrinks domain of *Erie*

commercial disputes and other cases of national concern. *See, e.g.*, Fletcher, *supra* note 160, at 1527–28 ("Federal courts usually felt obliged to comply with state law only in subject areas of peculiarly local concern, such as title to real property."); *id.* at 1532 (noting that "[t]he dividing line between general law and local law was unclear," and that federal courts "usually followed general law when the subject matter was of national concern, as in commercial cases"); *id.* at 1538–39 (cataloging the early nineteenth-century marine-insurance cases, and noting that all fifty-three of them applied general common law rather than state law); *see also* The Paquete Habana, 175 U.S. 677, 700 (1900) (applying customary international law in a case with "no treaty, and no controlling executive or legislative act or judicial decision" on point); Coolidge v. Payson, 15 U.S. (2 Wheat.) 66 (1817) (applying the general law merchant, rather than state law, to resolve a negotiable-instrument case).

The next part will consider how textualist justices might implement this theory of stare decisis in light of the institutional realities of judging.

III. STARE DECISIS AND DECISIONMAKING

Part II showed that the Supreme Court never violates the Supremacy Clause if it invokes stare decisis to uphold a federal statute or treaty or invalidate a state law. The Supremacy Clause does, however, constrain a textualist jurist's ability to use stare decisis when invalidating a federal statute or treaty, or rejecting a constitutional challenge to state law. A textualist cannot nullify a constitutional act of Congress, or enforce an unconstitutional state law, simply by incanting an erroneous constitutional precedent; he cannot invert the hierarchy of laws established in Article VI in the name of promoting stability, reliance interests, or any of the policies that undergird stare decisis.

But no judge is able to detect "correct" and "mistaken" constitutional precedents with perfect accuracy. Every Supreme Court justice will encounter uncertainties in determining whether a precedent correctly interprets the Constitution.[230] And even when certain that a precedent is right or wrong, a justice can be mistaken, even by reference to his own interpretive theories.[231] This is especially true with textualist theories of constitutional interpretation, which confront serious epistemic challenges when the historical evidence surrounding original meaning is conflicting or unclear. Part II assumed away these problems; this Part will explore how a justice might implement this theory of stare decisis in light of these institutional constraints.[232]

All judges, whether textualists or pragmatists, will incur decision costs and error costs when deciding constitutional cases; they can hope only to

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230. *See, e.g.*, Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 496 (1987) (Scalia, J., concurring) (noting that the "correctness of *Hans* as an original matter" presents a "complex" question).

231. *See, e.g.*, LEARNED HAND, *The Spirit of Liberty*, *in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 189, 190 (Irving Dillard ed., 2d ed. 1953) ("The spirit of liberty is the spirit which is not too sure that it is right[.]"); SUNSTEIN, *supra* note 21, at 139 (noting that judges may adopt decisionmaking strategies "out of an awareness of their own limitations and their capacity for error"). *Compare* Apprendi v. New Jersey, 530 U.S. 466, 481–83 & nn.9–10 (2000) (relying on Joel Prentiss Bishop's criminal-law treatises to support the claim that the Sixth and Fourteenth Amendments, as originally understood, required that any fact that increased the maximum allowable penalty was treated as an "element" of a crime), *and id.* at 510–12 (Thomas, J., concurring) (same), *with* Jonathan F. Mitchell, *Apprendi's Domain*, 2006 SUP. CT. REV. 297, 329–42 (compiling nineteenth-century state-court rulings that contradict the claims in Bishop's treatises).

232. *See* VERMEULE, *supra* note 23, at 1 ("The question in law is never 'How should this text be interpreted?' The question is always 'What decision-procedures should particular institutions, with their particular capacities, use to interpret this text?' "); *see also* Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 255 ("What decision procedure should a nine-member body employ to reach the best decisions *they* can over an array of cases highlighting experiential and political differences among the nine decisionmakers?").

minimize and not eliminate these costs. Even textualists, who are generally loath to subordinate the pursuit of legally correct answers to consequentialist considerations, will confront cases in which they remain uncertain even after exhaustively researching the relevant case law and academic commentary.[233] Scholars who have devoted years of study to the Fourteenth Amendment offer no fewer than four interpretations of the Privileges or Immunities Clause, all of which find plausible support in the relevant historical materials.[234] No jurist can hope to land on the "correct" interpretation of this constitutional provision with any degree of confidence. Judges also face time constraints and opportunity costs in pursuing the legally correct interpretation of a constitutional provision. At some point the decision costs will max out, and the judge must dispose of the case by resorting to heuristics or tiebreakers.[235] Judges often use stare decisis as a tiebreaking mechanism in these unavoidable situations; deference to the political branches serves as another plausible candidate for this role.[236]

All of these decisionmaking strategies entail some risk of error costs. But the Supremacy Clause provides a richer model of error costs for textualists who must choose tiebreaking mechanisms in cases of uncertainty. Once we account for the Supremacy Clause constraints on constitutional stare decisis, every case presents two distinct types of error costs. The first is "constitutional-interpretation error," the risk that a justice will join an *opinion* (or re-affirm a prior opinion) that misconstrues provisions in the Constitution, as judged by his own interpretive theories. This risk exists

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233. *See, e.g.*, Adam M. Samaha, *Originalism's Expiration Date*, 30 CARDOZO L. REV. 1295, 1328 (2008) (noting that originalism requires decision rules "for situations in which the method 'runs out' and ends in uncertainty").

234. *See, e.g.*, BERGER, *supra* note 25, at 18–19 (arguing that the Privileges or Immunities Clause forbids only race discrimination regarding the rights listed in the Civil Rights Act of 1866); JOHN HART ELY, DEMOCRACY AND DISTRUST 28 (1980) (characterizing the Privileges or Immunities Clause as "a delegation to future constitutional decision makers to protect certain rights that the document neither lists, at least not exhaustively, nor even in any specific way gives directions for finding," and arguing that the privileges or immunities of citizens should include "representation-reinforcing" rights that protect political minorities); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992) (arguing that the Privileges or Immunities Clause incorporates many, though not all, of the provisions in the Bill of Rights against the states); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1388 (1992) (characterizing the Privileges or Immunities Clause as primarily an anti-discrimination provision, and arguing that "[t]he main point of the clause is to require that every state *give the same privileges and immunities of state citizenship*—the same positive law rights of property, contract, and so forth—to all of its citizens" (emphasis added)).

235. *See, e.g.*, FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 101–02 (1991) ("A decision procedure that aims to optimize in every case may be self-defeating, producing worse results in the aggregate than a decision procedure with more modest ambitions. . . . [R]ules may at times represent second-best solutions, optimal in reality even though suboptimal from the perspective of an unattainable (in practice) ideal.").

236. *See* Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269 (1997).

whenever a judge purports to rule on the meaning of a constitutional provision. Even when the justices reject a constitutional challenge to a federal statute or treaty, or sustain a constitutional challenge to state law, the Court's opinion, or the judicial precedents on which the Court's opinion rely, may announce (in a case of first impression) or perpetuate (in a case involving stare decisis) a mistaken interpretation of the Constitution. The second type of error costs is "Supremacy Clause error," the risk that an erroneous constitutional interpretation will cause the Court's *judgment* to violate the hierarchy of laws established in the Supremacy Clause. This risk is not present when the justices uphold federal statutes or treaties, or subordinate state laws to constitutional precedents, because those dispositions can always be rationalized as rulings that expand the domain of either congressional supremacy or general common law. But the risk of Supremacy Clause error will lurk whenever the justices sustain a constitutional challenge to a federal statute or treaty, or reject a constitutional challenge to state law. Supremacy Clause error compounds the constitutional-interpretation error, because it means that one cannot concoct a constitutionally permissible rationale for the Court's disposition. In these situations, the justices are not merely misinterpreting the Constitution in their written opinion; they are violating the Supremacy Clause and entering judgment for the wrong party.

Now consider a jurist who remains unsure whether Article I of the Constitution allows Congress to enact legislation abrogating a state's sovereign immunity. He considers the issue a toss-up, with risks of constitutional-interpretation error no matter which way he votes. Many justices in this situation would allow stare decisis to resolve this issue. But stare decisis is the wrong tiebreaker to use in these types of cases; the better tiebreaker is the presumption of constitutionality that the Supreme Court (sporadically) applies when litigants bring constitutional challenges to acts of Congress. The reason is simple: if *Hans v. Louisiana*[237] and *Seminole Tribe v. Florida*[238] correctly interpreted the Constitution, then the Supremacy Clause permits (but does not require) the justices to nullify federal statutes that abrogate state sovereign immunity. But if *Hans* or *Seminole Tribe* is wrong, then applying stare decisis will cause the justices to subordinate a "supreme" federal statute to a nonsupreme judicial precedent, violating the hierarchy established in Article VI. Upholding the (perhaps unconstitutional) federal statute avoids *any* risk of Supremacy Clause error, while enforcing the (perhaps unconstitutional) judicial precedents will cause the Court to violate the Supremacy Clause if the judicial precedents adopted mistaken constitutional interpretations. If the judge views the risk of constitutional-interpretation error as a wash, then ties should go to the federal statute, not the Supreme Court's precedent that may or may not represent a proper interpretation of the "supreme" Constitution.

A similar decisionmaking framework applies when the justices consider constitutional challenges to state laws. Imagine a justice in 1954 who is in

237. 134 U.S. 1 (1890).

238. 517 U.S. 44 (1996).

equipoise over whether the Equal Protection Clause permits segregated public schools, and pondering whether to use *Plessy*'s endorsement of "separate but equal" as the tiebreaker. Here, too, stare decisis is the wrong tiebreaker to apply, because it would present the risk of elevating an unconstitutional state law over the "supreme" federal constitution. The same problem would be presented by a tiebreaker that resolves all doubts in favor of the state law's constitutionality (a "presumption of constitutionality" for state laws). In these situations, where the constitutional arguments attacking and defending a state law lead to stalemate, the justices should err on the side of the litigant challenging the state law; any tiebreaking procedure that tilts the Court's disposition in favor of upholding a possibly unconstitutional state law will bias the Court's disposition toward potential Supremacy Clause error, without reducing the likelihood of constitutional-interpretation error.

IV. IMPLICATIONS

This part will explore the implications of this textualist theory of stare decisis. Section IV.A analyzes the Supreme Court's stare decisis jurisprudence, which, for the most part, has complied with this textualist construction of the Supremacy Clause. Section IV.B considers the precedential weight of Supreme Court decisions that overrule constitutional precedents. Finally, Section IV.C explores the role of stare decisis when litigants challenge the constitutionality of executive-branch actions.

A. *The Supreme Court's Case Law*

The Supremacy Clause enables textualist jurists to rationalize many (though not all) of the Supreme Court's prominent treatments of constitutional precedent. The decisions that use stare decisis to reject Commerce Clause challenges to congressional legislation,[239] apply the Bill of Rights to the states,[240] or invalidate racial classifications in state laws[241] all comply with the hierarchy of laws established in Article VI. All of these rulings can be recast as decisions that either expand the domain of congressional supremacy or subordinate state law to general common law.

Even when the justices invoke precedent to nullify a federal statute, or reject a constitutional challenge to state law, they often make clear that they regard the disputed precedent as a correct interpretation of the Constitution. In *Federal Maritime Commission v. South Carolina State Ports Authority*,[242] where the Rehnquist Court invalidated a federal statute that subjected states to suit before administrative tribunals, the five-justice majority described *Hans v. Louisiana* and other relevant precedents as "well-reasoned,"[243] indi-

239. Gonzales v. Raich, 545 U.S. 1 (2005); Daniel v. Paul, 395 U.S. 298 (1969).

240. *See* McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).

241. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

242. 535 U.S. 743 (2002).

243. *Fed. Mar. Comm'n*, 535 U.S. at 754.

cating that *Hans*'s persuasiveness, rather than its mere status as precedent, was driving the Court's analysis. Of course, the justices may still have embraced a mistaken interpretation of the Eleventh Amendment in that case, but they did not apply stare decisis in an unconstitutional manner.

Some of the Court's rulings invoke precedent in a manner that violates Article VI's hierarchy of laws, but only a few. The most obvious example is *Dickerson v. United States*,[244] where the justices invalidated an act of Congress solely on the stare decisis effects of *Miranda v. Arizona*.[245] Although the Supremacy Clause permits the justices to use *Miranda* and other judicial precedents as rules of decision when reviewing state-court convictions, they cannot subordinate a "supreme" federal statute to a prior Supreme Court decision, unless the statute violates the Constitution itself. The *Dickerson* Court did not (and could not) claim that 18 U.S.C. § 3501 contradicted any provision in the Constitution, so it violated the Supremacy Clause by exalting its *Miranda* decision over an act of Congress. The same goes for *Adarand Constructors, Inc. v. Peña*,[246] where the justices nixed a federal affirmative-action statute by relying solely on the precedential effects of earlier-decided court rulings. The language of the Fourteenth Amendment's Equal Protection Clause does not apply to the federal government, and rather than attempt to demonstrate how some other constitutional provision might impose an equality-of-treatment obligation on federal officials, the majority opinion was content to rely solely on the existence of judicial precedents asserting that identical constitutional standards should govern federal and state racial classifications.[247] That analysis is far too cavalier. Any decision to invalidate an act of Congress requires some demonstration of how the federal statute violates actual provisions in the written Constitution; talismanic invocations of controversial judicial precedents won't suffice.

The paramount implication is that the Supremacy Clause limits the weight that stare decisis can receive, but only in cases where the justices invoke it to invalidate a federal statute, or uphold a state statute against federal constitutional challenge. This makes the Court's seemingly contradictory rulings in *City of Richmond v. J.A. Croson Co.*[248] and *Metro Broadcasting, Inc. v. FCC*[249] perfectly logical. *Croson* had invalidated a municipality's quota system for minority-owned businesses, while *Metro Broadcasting* upheld a hard-to-distinguish minority-preference policy that Congress had imposed on the FCC. The Court distinguished *Croson* by invoking the congressional legislation that authorized the FCC's policy: "It

244. 530 U.S. 428 (2000).

245. *Dickerson*, 530 U.S. at 443 (2000) ("Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.").

246. 515 U.S. 200 (1995).

247. *Adarand Constructors, Inc.*, 515 U.S. at 212–31.

248. 488 U.S. 469 (1989).

249. 497 U.S. 547 (1990).

is of overriding significance in these cases that the FCC's minority ownership programs have been specifically approved—indeed, mandated—by Congress."[250] Indeed so, but this significance depends not on the Court's questionable empirical assertion that Congress is more trustworthy than the states.[251] Rather, it depends on the constitutional limits that the Supremacy Clause imposes on stare decisis. Once Congress enacts a federal statute, the weight normally given to judicial precedent qua precedent melts away, and the Constitution does not allow the Court to nullify congressional legislation merely for conflicting with *Croson* or any other precedent of the Court. No such constraints on stare decisis exist when the justices invalidate state affirmative-action policies.

Likewise for the Supreme Court's difficult-to-reconcile decisions in *Stenberg v. Carhart*,[252] which invalidated a state partial-birth abortion ban, and *Gonzales v. Carhart*,[253] which upheld a federal statute banning the same procedure. Supporters of legalized abortion complained loudly that the *Gonzales* Court gave short shrift to stare decisis considerations,[254] after the *Stenberg* Court had nixed the state law by relying solely on the precedential effects of *Roe v. Wade*[255] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[256] Here, too, the Supremacy Clause offers an explanation for the difference in approaches. State law is nonsupreme; therefore the Constitution allows the justices to subordinate state law to judicial precedent. An act of Congress, by contrast, is the supreme law of the land whenever it comports with the Constitution, and the justices cannot trump an otherwise constitutional federal statute by invoking a nonsupreme judicial precedent. A textualist justice must respect congressional legislation unless he deems it repugnant to a proper interpretation of the Constitution. The Supremacy Clause would not have allowed any of the justices in the *Gonzales* majority to ditch a federal statute by relying on a precedent that they deemed erroneous.

Perhaps by happenstance, the seemingly opportunistic use of precedent by the Supreme Court's liberal justices fits almost hand-in-glove with this Supremacy Clause–inspired theory of stare decisis. The Court's liberals refuse to give precedential weight to *Seminole Tribe v. Florida*[257] (which

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250. *Metro. Broad., Inc.*, 497 U.S. at 563.

251. *Id.* (declaring that "deference was appropriate in light of Congress' institutional competence as the National Legislature").

252. 530 U.S. 914 (2000).

253. 550 U.S. 124 (2007).

254. *See, e.g.*, Martha C. Nussbaum, *The Supreme Court, 2006 Term—Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 84 (2007); Geoffrey R. Stone, Essay, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1538 (2008).

255. 410 U.S. 113 (1973).

256. 505 U.S. 833 (1992).

257. 517 U.S. 44 (1996).

invalidated an act of Congress)[258] and *Bowers v. Hardwick*[259] (which rejected a federal constitutional challenge to a state law).[260] Yet they continue to confer the mantle of stare decisis on *Roe v. Wade* (which invalidated a state law)[261] and the many decisions expanding congressional powers.[262] Legal-realist observers would chalk up these divergences to ideological preference and leave it at that.[263] Justice Souter has been especially criticized for his refusal to accord precedential weight to the Court's decisions invalidating federal statutes that abrogate state sovereign immunity and rejecting Establishment Clause challenges to state laws;[264] his intransigence on these matters seems especially rich given that he co-authored the symphony to constitutional stare decisis in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.

But the text of the Supremacy Clause provides a rationalization for all of these actions, without surrendering to the legal-realist mantra that treats judicial doctrines as nothing but politics in disguise. The text of the Supremacy Clause does not allow a justice to elevate an erroneous constitutional precedent over an act of Congress, or an unconstitutional state law over the federal Constitution. And the written Constitution does not permit the policy considerations of stare decisis to invert this hierarchy of laws. But in cases where the justices uphold federal statutes, or invalidate state laws, the Constitution allows stare decisis to control the Court's disposition. So there is nothing unprincipled about Justice Souter co-authoring the *Casey* opinion while digging in his heels when the topic of conversation changes to state sovereign immunity. The Supremacy Clause prohibits a justice from invalidating congressional legislation abrogating state sovereign immunity unless it actually conflicts with the Eleventh Amendment (or some other constitutional provision). If Justice Souter remains unconvinced that any such conflict exists, then he must dissent, no matter how many times the Rehnquist Court reaffirms *Seminole Tribe*. From this perspective, Justice Souter deserves praise, not criticism, for his obstinate refusal to yield to stare decisis in the sovereign-immunity cases. As do the dissenters in *United*

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258. *See, e.g.*, Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 788 (2002) (Breyer, J., dissenting) (promising "continued dissent" from the Rehnquist Court's sovereign-immunity jurisprudence); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 97 (2000) (Stevens, J., dissenting) ("Despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent.").

259. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

260. *See Lawrence*, 539 U.S. 558.

261. *See Casey*, 505 U.S. at 845–46.

262. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 20 (2005).

263. *See supra* note 56 and accompanying text.

264. *See, e.g.*, Charles Fried, *The Supreme Court, 2001 Term—Comment: Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 177, 190–91 (2002) (criticizing Justice Souter for opportunistically invoking stare decisis, and contrasting his eagerness to embrace precedent in *Casey* with his determination to overrule the Rehnquist Court's sovereign-immunity and Establishment Clause jurisprudence).

States v. Booker,[265] who refused to allow stare decisis considerations to control a constitutional challenge to the federal sentencing statute—even though an indistinguishable precedent, decided only one year earlier, had already doomed the federal sentencing guidelines.[266]

Of course, it is also unsurprising that the Court's liberal wing would be loath to use stare decisis to invalidate federal statutes and more eager to invoke it to nix state laws. Liberal jurists (as a general matter) favor broad judicial deference to acts of Congress, yet they are far more inclined to nullify state laws as unconstitutional. So one cannot entirely exclude the attitudinal political scientists' explanations for their voting patterns. But whether they intended this or not, the liberal justices' approach to stare decisis maps neatly on to Article VI's hierarchy of laws. Federal statutes are the supreme law of the land whenever they comply with the Constitution, and nothing written in a prior Supreme Court opinion can alter that hierarchy. State laws lack this exalted status under Article VI. Of course, liberal jurists also tend to be pragmatists rather than textualists, so they may not have much motivation to embrace this Supremacy Clause–inspired theory of stare decisis. But it does enable them to counter accusations that they are behaving opportunistically or lawlessly.

B. *The Precedential Value of Supreme Court Decisions Overturning Precedents*

The Supremacy Clause also has implications for the precedential value of Supreme Court rulings that overturn constitutional precedents. It is too simplistic to assume that *Brown v. Board of Education*'s decision to jettison *Plessy v. Ferguson* has any bearing on whether to retain *Roe v. Wade*, or that *Planned Parenthood v. Casey*'s glorification of constitutional stare decisis has any relevance in deciding whether to reaffirm *Bowers v. Hardwick*. In some of these cases, the Supremacy Clause constrains the justices' ability to invoke stare decisis. In others, the Constitution gives the justices latitude to use their precedents as rules of decision. It is crucial to distinguish these cases; the justices' treatment of stare decisis in one type of case has little to say for the use of precedent in the other.

Consider *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[267] where the Court held that stare decisis compelled it to reaffirm its controversial ruling in *Roe v. Wade*, even as it acknowledged that *Roe* had

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265. *See* 543 U.S. 220, 326–31 (2005) (Breyer, J., dissenting) (refusing to accept the binding authority of the Court's precedents when considering a constitutional challenge to the federal sentencing statute).

266. *See* Blakely v. Washington, 542 U.S. 296 (2004) (prohibiting judges from imposing sentences beyond the maximum sentence allowed based on facts found by the jury or admitted by the defendant); United States v. Booker, 543 U.S. 220, 233 (2005) ("As the dissenting opinions in *Blakely* recognized, there is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in that case.").

267. 505 U.S. 833 (1992).

"engendered opposition" and "disapproval."[268] The *Casey* opinion labored mightily to distinguish *Brown v. Board of Education*[269] as well as its "switch in time" of 1937, each of which had overruled major constitutional precedents in response to sustained public criticism and opposition.[270] But the easy way to distinguish those episodes from the situation in *Casey* is to note that the Supremacy Clause *prohibits* the justices from relying on stare decisis considerations once they conclude that a state law conflicts with a federal constitutional provision (as in *Brown*), or that a federal statute comports with the Constitution (as in *NLRB v. Jones & Laughlin Steel Corp.*[271]). When the *Brown* Court determined that separate-but-equal regimes violate the Equal Protection Clause, it could not rely on *Plessy v. Ferguson* to justify a decision elevating an unconstitutional state law over the supreme federal constitution—at least not without violating the hierarchy of laws established in Article VI.[272] And once the justices in *Jones & Laughlin* concluded that the National Labor Relations Act fell within Congress's Article I commerce powers, they could not subordinate this "supreme" act of Congress to their nonsupreme precedents that had narrowly construed Congress's Article I powers, no matter what "reliance interests" may have been at stake.[273] But the decisions to depart from stare decisis in *Brown* or *Jones & Laughlin* have no precedential value for situations such as *Casey*, where the Supremacy Clause gives the justices the freedom to choose whether to apply an erroneous constitutional precedent as a rule of decision. Because *Casey* involved a challenge to *state* abortion regulations, the justices could subordinate these state laws to general common law without violating the Supremacy Clause. That means that even if *Roe* had misinterpreted the Constitution by treating abortion as a federal constitutional right, the *Casey* ruling could still apply the *Roe* regime as a rule of decision by reconstituting it as general common law.[274] This approach enables the *Casey* Court to distinguish its treatment of stare decisis from not only *Brown* and *Jones & Laughlin*, but also the post-*Casey* ruling in *Lawrence v. Texas*[275]—and it rests on a distinction that transcends ideological preferences. The joint opinion's effort in *Casey* runs the risk of making stare decisis seem like a ratchet that turns only in leftward directions, an impression that is only

268. *Casey*, 505 at 855, 860–61.

269. 347 U.S. 483 (1954).

270. *See Casey*, 505 U.S. at 863–64.

271. 301 U.S. 1 (1937).

272. *See supra* Section II.B.3.

273. *See supra* Section II.B.2.

274. Of course, the *Casey* Court would still need to provide a persuasive justification for its decision to apply judicial precedents as general common law over the abortion policies enacted by a state's elected representatives. The point is only that Article VI has nothing to say on that fiercely debated question.

275. 539 U.S. 558 (2003) (refusing to adhere to stare decisis after concluding that a state criminal prohibition on homosexual sex conflicted with the federal Constitution).

amplified by the Court's alacrity in overruling *Bowers v. Hardwick* eleven years later.

The same goes for efforts to use *Casey* as a precedent in cases where the Supremacy Clause limits the use of stare decisis. *Casey*'s approach to stare decisis works in only a limited subset of cases: those in which the Court's disposition upholds an act of Congress or subordinates state law to judicial doctrine. It does not license the justices to invoke their controversial precedents to invalidate federal legislation (as in *Dickerson* or *Seminole Tribe*) or reject federal constitutional challenges to state laws. In those situations, the Constitution compels the justices to follow the hierarchy in the Supremacy Clause rather than stare decisis.

C. *Stare Decisis in Cases Challenging Executive-Branch Action*

What about stare decisis in cases that challenge the legality of executive-branch action? A number of famous and controversial Supreme Court precedents address the constitutionality of unilateral presidential decisions, including *United States v. Curtiss-Wright Export Corp.*,[276] *United States v. Belmont*,[277] *United States v. Pink*,[278] and *Dames & Moore v. Regan*.[279] Does the Supremacy Clause impose any constraints on the justices' ability (or the ability of executive-branch lawyers) to apply these cases as authoritative precedents when litigants challenge the executive branch?

Presidential actions and decrees are not the "supreme Law of the Land"; they are neither treaties nor are they "[l]aws of the United States" made in accordance with Article I, Section 7. Sometimes, of course, an act of Congress may authorize or command the executive branch to act. But decisions that implement or interpret an act of Congress do not become "supreme" law themselves; at most they can establish binding interpretations of the federal statute's meaning. They are no more "supreme" than the judicial precedents that interpret federal statutes or constitutional provisions.

The Supremacy Clause prohibits textualists from invoking wrongly decided precedents to elevate a nonsupreme law over a supreme one. There are two ways this could happen in executive-power cases. First, stare decisis might lead someone to elevate a mere presidential action or decree (nonsupreme) over either a federal statute or constitutional command (supreme). This means that textualist jurists cannot subordinate an act of Congress to an executive-branch policy merely by invoking *Curtiss-Wright* and treating it

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276. 299 U.S. 304, 319 (1936) (upholding the president's authority to prohibit sales of arms to other countries, and declaring that "[t]he President is the sole organ of the nation in its external relations").

277. 301 U.S. 324 (1937) (enforcing an executive agreement between the United States and the Soviet Union and using it to displace state law).

278. *See* 315 U.S. 203 (1942) (following *Belmont* by enforcing an executive agreement and using it to displace state law).

279. 453 U.S. 654 (1981) (enforcing an executive agreement that settled legal claims of U.S. nationals against the government of Iran and relegated those claims to an international tribunal).

as binding precedent;[280] the supremacy clause permits this outcome only when the Constitution, properly interpreted, disables Congress from enacting the relevant federal statute. Second, stare decisis might cause someone to elevate a wrongly decided judicial precedent (nonsupreme) over a constitutional act of Congress (supreme). If Congress enacts legislation attempting to shape the country's foreign policy, a textualist cannot nullify those statutes by simplistically invoking *Curtiss-Wright*'s mantra that declares the president "the *sole organ* of the nation in its external relations."[281] He must instead find that the statutes contradict the written Constitution. There is no problem with relying on *Curtiss-Wright* if it correctly interprets the Constitution, but a textualist cannot simply assume the correctness of *Curtiss-Wright* and then use it to displace a supreme act of Congress.

The Supreme Court may, however, invoke stare decisis in cases where executive-branch actions conflict with state law. Executive orders and executive agreements, like state law, are nonsupreme, and the Supremacy Clause fails to establish any hierarchy among these laws. The text of the Constitution therefore leaves the justices with discretion to decide whether to apply state law or executive-branch policies as rules of decision, and stare decisis considerations may inform their choices. The justices, for example, chose to use the president's executive agreements rather than state law as rules of decisions in *United States v. Belmont*[282] and *United States v. Pink*,[283] even though executive agreements cannot qualify as "supreme" law under Article VI. Then they relied on *Belmont* and *Pink* to justify their decisions to follow the president's executive orders and executive-branch policies, rather than state law, in cases such *Dames & Moore v. Regan*,[284] and *American Insurance Ass'n v. Garamendi*.[285] In *Medellín v. Texas*,[286] by contrast, the justices chose to follow state law rather than allow a presidential "memorandum" to supply the rule of decision. The Constitution permits stare decisis to play a prominent role in the evolution of this executive-power

280. *See, e.g.*, U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 6–10 (2006), *available at* http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf (relying on *Curtiss-Wright* and other judicial precedents to justify the Bush Administration's disregard of federal statutory provisions in the Foreign Intelligence Surveillance Act).

281. *Curtiss-Wright*, 299 U.S. at 319 (emphasis added).

282. *Belmont*, 301 U.S. at 327.

283. *Pink*, 315 U.S. at 230–31.

284. *Dames & Moore*, 453 U.S. at 679 ("[T]here has also been a longstanding practice of settling [claims of American nationals against foreign countries] by executive agreement without the advice and consent of the Senate.").

285. 539 U.S. 396, 415–17 (2003) (invoking *Belmont* and *Pink* to support the propositions that "executive agreements are fit to preempt state law" and that a "claim of preemption [may] rest on asserted interference with the foreign policy those agreements embody").

286. 552 U.S. 491, 532 (2008) ("The Executive's narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement cannot stretch so far as to support the current Presidential Memorandum.").

jurisprudence, so long as the cases involve a choice between two non-supreme sources of law.

This approach also gives added significance to Justice Jackson's canonical framework for judging the legality of executive-branch action. Jackson's famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*[287] established three categories for judging the legality of presidential actions. "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum . . . ."[288] When he acts "in absence of either a congressional grant or denial of authority," he can rely on "his own independent powers, but there is a zone of twilight in which [the president] and Congress may have concurrent authority, or in which its distribution is uncertain."[289] And when he "takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."[290] Jackson acknowledged that this was "a somewhat over-simplified grouping,"[291] but his approach to executive power has proved influential.[292]

The constitutionality of stare decisis in executive-power disputes will depend on which *Youngstown* category applies. In Jackson's first category, where a "supreme" federal statute authorizes the president's actions, the justices may freely rely on stare decisis to uphold the president's decisions. The Supremacy Clause always permits the justices to enforce an act of Congress as the supreme law of the land, and a decision upholding a congressionally authorized executive action can always be re-rationalized as a ruling that permits federal statutes to have the final word on constitutional meaning. This is no different from allowing *Wickard* to control the outcome in *Raich*; even if *Wickard* is wrong, the Supremacy Clause still permits the justices to respect the finality of Congress's mistaken constitutional pronouncements. The justices may not, however, use wrongly decided judicial precedents to invalidate presidential actions in Jackson's first category; that

287. 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

288. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

289. *Id.* at 637 (Jackson, J., concurring).

290. *Id.* (Jackson, J., concurring).

291. *Id.* at 635 (Jackson, J., concurring).

292. Both Chief Justice Roberts and Justice Alito endorsed the Jackson framework during their confirmation hearings as the starting point from which to evaluate executive-power claims. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 152 (2005) (statement of John G. Roberts, Jr., J., D.C. Circuit); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 403 (2006) (statement of Samuel A. Alito, Jr., J., 3d Circuit). Other jurists and commentators have heaped praise on Jackson's opinion. *See, e.g.*, Sanford Levinson, *Speaking in the Name of the Law: Some Reflections on Professional Responsibility and Judicial Accountability*, 1 U. ST. THOMAS L.J. 447, 462 (2003) (describing Jackson's *Youngstown* concurrence as "the greatest opinion in our 215-year history of constitutional opinions"); William H. Rehnquist, *Robert H. Jackson: A Perspective Twenty-Five Years Later*, 44 ALB. L. REV. 533, 539 (1980) (calling the *Youngstown* concurrence "a 'state paper' of the same order as the best of the Federalist Papers, or of John Marshall's opinions for the Court").

would subordinate a "supreme" act of Congress to a "nonsupreme" court decision. For these dispositions, the justices may invoke judicial precedents only if the federal statute on which the president relies actually conflicts with the Constitution.

In Jackson's third category, where the president acts in the teeth of a federal statutory prohibition, the Supremacy Clause inverts this role for stare decisis. Here, a court decision invalidating the executive-branch action will enforce the federal statute. But the Supremacy Clause permits the Supreme Court to enforce even unconstitutional congressional legislation, so the Constitution presents no obstacle if the justices uphold the statutory prohibition by giving stare decisis considerations controlling weight—regardless of whether the relevant judicial precedents were correctly decided. The justices cannot, however, uphold presidential actions in Jackson's third category merely by invoking a wrongly decided judicial precedent. That would allow both a nonsupreme judicial precedent and a nonsupreme executive action to trump a "supreme" (and constitutional) act of Congress. So the supremacy clause limits the use of stare decisis in those situations.

Finally, in Jackson's second category—the "zone of twilight"—the executive action is neither blessed nor prohibited by a "supreme" act of Congress. But it might conflict with a state law or with a federal constitutional provision. In cases where a nonsupreme executive action conflicts with a nonsupreme state law, the Supremacy Clause is silent on the rules of priority, and nothing in the written Constitution precludes the justices from resorting to stare decisis to break the deadlock. Stare decisis cannot, however, be used to exalt a nonsupreme executive action over a "supreme" federal constitutional command. Consider, for example, the many precedents holding provisions in the Bill of Rights inapplicable to executive actions taken against aliens outside of U.S. territory.[293] A justice who deems these decisions mistaken cannot decide to uphold an unconstitutional executive-branch action outside our borders in the name of promoting "stability," "reliance interests," or other stare decisis–related policy considerations. On the other hand, a justice may rely on erroneous judicial precedents to invalidate an executive-branch action in Jackson's second category. This would simply pit two nonsupreme laws against each other, and there is nothing wrong with using stare decisis as a tiebreaker in those situations.

293. *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 266 (1990) ("[T]he purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory."); Johnson v. Eisentrager, 339 U.S. 763, 783 (1950) (rejecting the notion that "the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses"); United States v. Belmont, 301 U.S. 324, 332 (1937) ("[O]ur Constitution, laws and policies have no extraterritorial operation, unless in respect of our own citizens.").

CONCLUSION

For stare decisis to obtain universal acceptance, it must rest on rationales that can satisfy both pragmatists and textualists. Fortunately, the words of the written Constitution can accommodate many (though not all) applications of constitutional stare decisis. Textualist attacks on constitutional stare decisis go off track by begging two questions that the written Constitution simply does not answer. The first is whether, and to what extent, the Constitution obligates the Supreme Court to disregard unconstitutional congressional enactments. The second involves the rules of priority between state law and other sources of nonsupreme law, including judicial precedents, executive-branch actions, general common law, and customary international law. *Marbury* and *Erie* purport to answer these two questions, but textualism requires the Supreme Court to observe only the external legal constraints imposed by the written Constitution, not the self-imposed constraints created by previous justices.

Peeling away the barnacles of interpretive gloss shows that the written Constitution permits the Supreme Court to use wrongly decided precedents as rules of decision whenever it upholds a federal statute or treaty, or invalidates a state law. But the Supremacy Clause does limit the justices' ability to invoke stare decisis in rulings that nullify federal statutes, or that reject constitutional challenges to state laws. This asymmetric theory of constitutional stare decisis may create some tension with the opinions in *Marbury* and *Erie*. But it does not contravene the written word of the Constitution. And that is all that needs to be shown to establish its constitutionality.